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IN THE

Supreme Court of the United States

LACKAWANNA COUNTY DISTRICT ATTORNEY; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

v.

EDWARD R. COSS, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the custody requirement of the federal habeas corpus statute preclude, under all circumstances, a challenge upon a fully expired conviction that was used to enhance a current conviction under habeas attack and for which the petitioner is presently in custody?

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OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Third Circuit, filed February 29, 2000, which reversed the United States District Court for the Middle District of Pennsylvania and conditionally granted the petition for habeas corpus is reported at 204 F.3d 453 (3d Cir. 2000) and is unofficially reported at 2000 WL 225898 (3d Cir. (Pa.), Feb 29 2000) (No. 98-7416). A copy of said opinion is reprinted in Appendix A at 1a.

A previous opinion entered on June 28, 1999 by the United States Court of Appeals for the Third Circuit, would have reversed the United States District Court for the Middle District of Pennsylvania, but for different reasons, and would have conditionally granted the petition for habeas corpus. Said opinion has not been officially published, but is unofficially reported at 1999 WL 495123 (3d Cir. (Pa.), June 28, 1999) (No. 98-7416). A copy of said opinion is reprinted in Appendix B at 50a.

By order dated July 30, 1999, rehearing was granted, the previous opinion of June 28, 1999 (Appendix B) was vacated and the cause was listed for rehearing *en banc*, resulting in the opinion entered on June 28, 1999 (Appendix A). This order dated July 30, 1999 has not been officially published but is unofficially reported at 1999 WL 566730 (3d Cir. (Pa.), July 30, 1999) (No. 98-7416). A copy of such order is reprinted as Appendix C at 94a.

The orders and memorandum opinion of the United States District Court for the Middle District of Pennsylvania denying the instant habeas petition are unpublished and are reprinted herein as Appendix D at 95a.

STATEMENT OF JURISDICTION

The judgment or order sought to be reviewed was entered February 29, 2000 (Appendix A at 1a).

Rehearing was not sought with respect to the judgment or order sought to be reviewed; however an order respecting rehearing of the previous judgment and opinion entered on June 28, 1999 by the United States Court of Appeals for the Third Circuit was entered by the United States Court of Appeals for the Third Circuit on July 30, 1999 and is reprinted herein as Appendix C at 94a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2241(c)(3), which provides:

> The writ of habeas corpus shall not extend to a prisoner unless —
>
> * * *
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a), which provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

Respondent Edward R. Coss, Jr. brought this habeas corpus action pursuant to 28 U.S.C. § 2254. The United States Court of Appeals for the Third Circuit reversed the District court's denial of relief and conditionally granted habeas corpus relief by opinion and order entered on February 29, 2000. Rehearing of such judgment was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Respondent is a multiple criminal offender whose extensive criminal history is detailed in Appendix A at pages 31a-34a. These habeas corpus proceedings raise claims of constitutional error based upon isolated segments of that criminal history upon which respondent relies to support for his federal *habeas* contentions that:

> (a) because one of his former convictions, a 1986 conviction for simple assault, for which he is no longer incarcerated or under any parole restraint, was tainted by constitutional infirmity arising as the result of ineffective assistance of trial counsel, and
>
> (b) because that former 1986 conviction for simple assault was improperly considered when he was sentenced for a subsequent offense,

the term of incarceration for the subsequent offense violates respondent's constitutional rights.

The former conviction occurred in 1986 following a jury trial for simple assault. It resulted in a two year prison sentence which began in 1986 and ended in 1988 at which time respondent was released from prison. Thus, long before the present habeas proceedings began, respondent was no longer serving any sentence for the 1986 simple assault conviction; the sentence for that conviction had been fully served.

Subsequently, in 1990, respondent was tried and convicted in the Pennsylvania courts for an offense which occurred following his release from prison and which was entirely unrelated to the 1986 simple assault conviction for which his state prison sentence had already been completed. Respondent contends (and the Court of Appeals for the Third Circuit, on a basis which is not entirely clear, agrees with such contention) that his current sentence which he presently is serving for the unrelated 1990 conviction was enhanced by reason of his long-since-completed 1986 conviction. Based upon respondent's further claim that the trial resulting in his 1986 conviction was tainted by ineffective assistance of trial counsel, respondent argues that the sentence for his 1990 conviction was adversely and unconstitutionally affected by the 1986 simple assault conviction, entitling him to federal habeas relief.

Through federal habeas corpus proceedings commenced by a petition filed September 15, 1994, Respondent seeks to litigate claims of constitutional error from a trial which resulted in a two-year prison sentence imposed upon him in 1986; a sentence which, by reason of having been fully served and respondent released from custody, expired in 1988.

REASONS FOR GRANTING THE WRIT

There are three separate reasons why the writ should be granted. Each of these reasons touches upon a question this Court expressly declined to answered in deciding *Maleng v. Cook*, 490 U.S. 488, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989). Utilizing the rationale employed in *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967), and its progeny, the *Maleng* court approved, in principle, review for habeas challenges to prior convictions which enhance a current sentence. However, the Court expressly left open the question of the extent to which prior convictions were subject to such attacks. *See Maleng v. Cook*, 490 U.S. 494.

In the three aspects next immediately listed, each of which will be discussed in turn and in detail, the Third Circuit opinion in this case points to the need for resolution of the issue left open in *Maleng*:

(1) It has become apparent, through the passage of time, that the Court's determination, as expressed in *Melang v. Cook*, not to express a definitive view on the extent to which an expired sentence may be challenged in the context of an attack on the current sentence it was used to enhance, has ripened into a problem of major significance; one which the courts of the several circuits have been unable to resolve uniformly.

(2) The conflict which exists among the courts of the several circuits concerning the manner in which the question left open by *Melang v. Cook* should be answered has resulted in a situation where the entitlement of a prisoner to secure relief under the federal habeas corpus acts has become largely dependent upon the circuit in which the prisoner's habeas corpus petition is filed.

(3) Recent congressional enactments which purport to place a strict one-year time limitation upon applicants for federal habeas relief tend strongly to warrant a definitive expression from the Court as to whether such congressional expression should be regarded as inveighing towards the answer to the question left open by *Melang v. Cook*.

I. LACK OF UNIFORMITY OF DECISIONS AMONG THE SEVERAL CIRCUITS.

One of the central[1] questions in federal habeas corpus jurisprudence remains without a clear answer from this Court: whether a prisoner can challenge the validity of an already expired sentence merely because he has committed more crimes, the sentences for which are affected by the earlier

1. Statistics: *Table 2.9; U.S. District Courts - Prisoner Petitions filed by Nature of Suit*, compiled by the Administrative Office of United States Courts and covering the fiscal year periods from 1988 through 1999 disclose that Habeas Corpus petitions in Private Cases (U.S. Cases are separately reported) rose from 18,588 habeas cases in a 44,778 annual total in 1998 to 20,251 habeas cases in a 45,744 annual total in 1999. A note addressing the *overall* statistics reports: "As a result of the Prisoner Litigation Reform Act and Title I of the Antiterrorism Act, both of which passed in April 1996, filings decreased in 1997 and 1998."

The actual numbers of reported annual *habeas* filings as well as the ratio of such filings to total annual filings by state prisoners defy the trend of decrease expressed in the quoted note. In the earliest reported year, 1988, rounding the totals, the ratio of habeas/total state prisoner filings was a mere 29.6% [10,300/34,500]. By 1997 the ratio had grown to 41.1% [19,700/48,000]. In 1998 the ratio was 41.6% [18,600/44,800] and in 1999 it had grown to 44.6% [20,300/45,700]. The "custody" question is always a threshold issue in these cases.

conviction. The Third Circuit and several other courts have endorsed such after-the-fact litigation. To reach that result, the court below disregarded the import of recent precedent from this court, intensified a circuit conflict, and undermined efforts to limit habeas attacks on stale convictions.

Although this Court has not specifically resolved the question involved here, it has developed the reasoning that is dispositive of the issue. In *Custis v. United States*, 511 U.S. 485, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994), a defendant facing sentencing under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), sought to challenge the validity of state sentences that would be used to enhance the ACCA sentence. This court held that the use of the prior sentences in determining the later sentence did not create an automatic right of collateral attack. Instead, the Court concluded that the underlying sentences could be reopened only if the statute under which the defendant was being sentenced expressly authorized such attacks or if the state convictions were obtained through an *absence* of counsel (which the *Custis* court pointed out should be distinguished from ineffective assistance[2] of counsel) in

2. Under the *Custis* approach, the Court pointed out that there is no constitutional or explicit statutory right to review of expired state sentences merely because they became a partial basis for a future sentence imposed for a different crime:

> Custis invites us to extend the right to attack collaterally prior convictions used for sentence enhancement beyond the right to have appointed counsel established in *Gideon*. We decline to do so.
>
> * * *

(Cont'd)

violation of *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

The *Custis* court based this conclusion on explicit analogy to the "principles of finality associated with habeas corpus actions." 511 U.S. 497, 114 S. Ct. at 1739. The Court relied also on the administrative difficulty of requiring judges to "rummage through frequently nonexistent or difficult to obtain state court records that may date from another era," *id.* at 1739-39, in cases that are being resurrected years later merely because the prisoner committed a new offense, placing his criminal history again in issue.

The *Custis* rationale is logically applicable to the question raised in this and a multitude of other habeas cases. The inquiry of whether the logic of *Custis* should be regarded as the law for such cases is essentially an examination into the proposition of whether or not *Custis* ought to be regarded as having answered the question left open by *Maleng*.

The case of this prisoner's 1986 conviction for simple assault is as final as it can be. Not only is all appeal concluded, but the sentence has been completely served[3].

(Cont'd)

> Custis attacks his previous convictions claiming the denia. of effective assistance of counsel. . . . None of these alleged constitutional violations rises to the level of a jurisdictional defect resulting from failure to appoint counsel at all.

Custis v. United States, *supra*, 511 U.S. 485, 496, 114 S. Ct. 1732, 1738.

3. This circumstance presents a case even stronger than that of Custis, who was still on state probation under the enhancing sentence (Cont'd)

The prisoner desires to revisit it now only because he chose to continue his criminal conduct, and his past has caught up with him.

Petitioner urged the Third Circuit, in the brief filed in that court, to be guided by the rationale of *Custis* in reaching its decision, but the Third Circuit ignored *Custis* entirely. Instead the Third Circuit (Appendix A at 12a) hinged this crucial aspect of its decision on its own "collateral consequences" rule developed for the Third Circuit in *Young v. Vaughn*, 83 F.3d 72, 78 (3d Cir. 1996) (holding that "a prisoner may attack his current sentence by a habeas challenge to the constitutionality of an expired conviction if that conviction was used to enhance his current sentence."). The Third Circuit Court also (again Appendix A at 12a) viewed its decision as being buttressed by *United States v. Tucker*, 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972). Two separate problems inhere in efforts to buttress *Young v. Vaughn* with *Tucker*.

In the first place, in *United States v. Tucker*, comity was not a consideration. Comity is an important consideration here. The *Tucker* court was faced with a situation where the Ninth Circuit court, in an appropriate exercise of its supervisory powers over a subordinate federal court of the Ninth Circuit had simply ordered the district court to sentence a federal prisoner on a federal conviction without reference to an invalid state court conviction. The reasoning employed

(Cont'd)

when he was sentenced for his federal crimes. *See* 1994 WL 663719 at *9. The fact that habeas review was still available for the defendant in *Custis* does not mean that it is available for prisoners who wish to resurrect attacks on already expired cases.

by Judge Aldisert in an earlier opinion which he filed in this case is instructive to the point:

> The teachings of Tucker do not constitute an appropriate analogue to this case or any other federal habeas case brought under § 2254. United States v. Tucker by caption and by content was not a habeas case brought under § 2254 based on a state conviction; the defendant there was seeking post conviction relief from a federal conviction pursuant to 28 U.S.C. § 2255. *This is a distinction with a fundamental difference.* (Italics supplied).
>
> * * *
>
> . . . In bringing his action, Tucker was attacking a federal sentence . . . that had been enhanced on the basis of invalid state court convictions. . . . Because the Court had no state officers as petitioners or respondents before it, the court lacked power or authority to give the option to a state court . . . to retry the defendant.
>
> * * *
>
> . . . [T]he Court had no alternative other than to order that the defendant be resentenced on the federal conviction without reference to the invalid state court convictions. (Appendix B at 87a).

The quoted reasoning reinforces the conclusion that in *Tucker* the Ninth Circuit Court, as was its entitlement — perhaps its obligation — was simply exercising its "supervisory power" over the conduct of a federal district

court in its jurisdiction. *See United States v. Hastings*, 461 U.S. 499, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983) (In the exercise of its supervisory powers, federal court may, within limits, formulate procedural rules not specifically required by the Constitution or Congress; the purposes underlying use of supervisory powers are to implement a remedy for violation of recognized rights, to preserve judicial integrity by assuring that a conviction rests on appropriate considerations validly before the jury, and to deter illegal conduct.).

Although it seems evident, it merits restatement here that even though *Tucker* did not involve the comity concepts which this case does, the Third Circuit court's reliance upon *Tucker* had little to do with comity; it had to do with buttressing the Third Circuit's "collateral consequences" concepts as expressed in *Young v. Vaughn*, *supra*.

The second reason, additional to concepts of comity, why *Tucker* ought not be given effect here is that the *Tucker* case was brought by a federal prisoner under the provisions of 28 U.S.C. § 2255. Here the habeas petition was brought by a state prisoner under the provisions of 28 U.S.C. § 2254.

On page 10 of the opinion for which review is sought the Third Circuit interprets *Tucker* as implicitly applicable to habeas cases brought under § 2254 based on a state conviction. In so doing, the Third Circuit ignores the distinguishing factor that the defendant in *Tucker* was seeking post conviction relief from a federal conviction pursuant to 28 U.S.C. § 2255. In such process the Third Circuit seems to have ignored that which Judge Aldisert had but recently declared was "a distinction with a fundamental difference." It appears that a similar distinction was found

to be of no consequence in *Maleng v. Cook*, but in *Maleng* this Court justified the result through the observation (490 U.S. at 493) that the State of Washington had placed a detainer with the federal authorities to ensure that at the conclusion of Maleng's federal sentence he would be returned to the state authorities to begin serving his 1978 state sentences.

Viewed in the context thus established, *Tucker* cannot fairly be regarded (*Maleng v. Cook*, notwithstanding) as constituting a holding by this Court that ". . . a prisoner could attack in a federal habeas proceeding an allegedly unconstitutional [state court] conviction, even if he has served in entirety the sentence resulting from the conviction, if that conviction had an effect on a present sentence." (Appendix A at 12a).

As a consequence of the foregoing analysis, it can be seen that the vitality of the Third Circuit "collateral consequences" rule, as promulgated in *Young v. Vaughn*, 83 F.3d 72, 78 (3d Cir. 1996) (holding that a prisoner may attack his current sentence by a habeas challenge to the constitutionality of an expired conviction if that conviction was used to enhance his current sentence) is not supported by *Tucker* if the expired conviction is a state court conviction. Moreover, it has been shown that the "collateral consequences" rule, which *Young v. Vaughn* announced is plainly at variance with the rationale expressed in *Custis v. United States*, 511 U.S. 485, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994).

Nevertheless, the Third Circuit Court ignored *Custis*, relying instead upon *Tucker* in an evident effort to suggest that the question left open by *Maleng v. Cook* was correctly

answered by the Third Circuit's 1996 decision in *Young v. Vaughn*. However, in 1994 the Court of Appeals for the Eighth Circuit answered the question left open by *Maleng v. Cook* in a manner exactly contrary to the result reached in the present case which, as noted, is based almost solely[4] upon

4. There is to be found in the Eighth Circuit court's opinion of *Partee v. Hopkins*, 30 F.2d 1011 (8th Cir. 1994), a factual/procedural detail remarkably similar to one dwelt upon by the Third Circuit opinion in this case; a detail which illustrates the imaginative lengths to which courts find themselves obliged to go if they choose to answer the "custody" question left open by *Maleng* through a line of reasoning at variance with the reasoning that controlled the decision in *Custis*.

> In *Partee v. Hopkins*, the court expressed "substantial doubt that Partee's claim is procedurally defaulted, as the district court assumed. . . .." but added that:
>
> we need not remand for further exploration of this issue. . . . [of procedural default because in]. . . . *Custis v. United States* (citation omitted), the Supreme Court held that there is no federal constitutional right to collaterally attack a prior conviction used to enhance a sentence on any constitutional ground other than failure to appoint counsel for an indigent defendant. *Custis* establishes that Nebraska's decision not to allow collateral *Boykin* attacks as a matter of State law does not entitle Partee to federal habeas corpus relief.

Partee v. Hopkins, supra, 30 F.3d at 1012.

At footnote 8 of the opinion in this case, the Third Circuit court raised, and then sought to skirt, the question of procedural bar. Such endeavor made necessary by the fact that, as the accompanying text of the opinion discloses, Coss had not "presented to the Pennsylvania state courts his claim that the invalid 1986 conviction was used to

(Cont'd)

the Third Circuit's 1996 decision of *Young v. Vaughn*. *See Partee v. Hopkins*, 30 F.2d 1011(8th Cir. 1994) where the court, in express reliance upon *Custis v. United States*, *supra*, denied a state prisoner's claim to federal habeas relief from a state court sentence enhanced because of a fully expired state court sentence which, arguably, may have been constitutionally infirm. In so doing the Eight Circuit Court ruled that "there is no federal constitutional right to

(Cont'd)
enhance the subsequent conviction, the conviction being challenged by the underlying habeas petition." The latter part of this quoted statement is something of an anomaly because although, in his habeas petition, Coss complains of his 1990 *sentence* (for which he *is* in present custody) the underlying *conviction* giving rise to such complaint is the 1986 conviction for which he is not in custody. The reason why Coss omitted to present in state court any claim that his 1986 conviction was used to enhance his subsequent conviction in 1990 was best stated in the earlier dissenting opinion of Judge Aldisert:

> The precise issue that occupies our attention was not raised by the parties, but was rather injected by the majority without briefing or argument. Indeed Coss did not even request the relief he is now receiving. In his Second Amended Habeas Corpus Petition, drafted by counsel, Coss simply sought a new trial of his 1986 conviction.

It therefore can be seen that the Third Circuit Court's discussion of procedural bar and that court's efforts to explain *Commonwealth v. Ahlborn*, 548 Pa. 544, 699 A.2d 718 (1997) was (as with the district court's supposition of procedural bar in *Partee*) an endeavor necessitated principally by the failure of the respective courts to recognize, as did the Eighth Circuit court in *Partee*, that procedural bar has little if anything to do with the answer to the "custody" question. The question of custody, although expressly left open by *Maleng*, was implicitly answered by *Custis*.

collaterally attack a prior conviction used to enhance a sentence on any constitutional ground other than failure to appoint counsel for an indigent defendant."

Because in *Partee v. Hopkins*, both the expired sentence and the enhancement of the subsequent sentence were exclusively state court matters, with no federal sentencing or custody features interposed, the rule which the Eighth Circuit extrapolated from *Custis* seems particularly apropos here.

Federal circuits other than the eighth have reached a result similar to that announced in *Partee v. Hopkins*, *supra*. *See Pleasant v. State of Texas*, 134 F.3d 1256 (5th Cir. 1998) (Petitioner whose federal sentence was enhanced as result of his prior state robbery conviction was not "in custody" with regard to the robbery conviction, as required to exercise federal habeas jurisdiction over his petition challenging that conviction, where, although petitioner was in federal custody in part because of enhancement of his federal sentence, he had served his state sentence; petitioner could only challenge his state conviction in postconviction petition to correct his federal sentence.)

The clearly present conflict among the several circuits will surely become more pronounced with each passing year. It seems time that the question left open by *Maleng v. Cook* should be expressly addressed and expressly resolved.

II. AS A RESULT OF THE CONFLICT AMONG THE CIRCUITS ARISING FROM THE QUESTION LEFT OPEN BY *MELANG v. COOK* THE ENTITLEMENT OF A STATE PRISONER TO SECURE FEDERAL HABEAS RELIEF NOW HINGES MAINLY UPON THE CIRCUIT IN WHICH THE PRISONER'S HABEAS CORPUS PETITION IS FILED.

The decisions cited in the foregoing section of this petition make plain that if, for example, the § 2254 habeas petition filed in the Third Circuit by Edward Coss had been filed in the 8th Circuit he would have been summarily denied any relief for the reasons expressed in *Partee v. Hopkins*, 30 F.2d 1011 (8th Cir. 1994). Correlatively, if the § 2254 habeas petition filed in the 8th Circuit by Roosevelt Partee had been filed in the Third Circuit then, the Third Circuit court, applying the rationale of *Young v. Vaughn*, 83 F.3d 72, 78 (3d Cir. 1996) would have found that Mr. Partee was "in custody" (even though the Eighth Circuit, upon the rationale of *Custis*, found to the contrary) and Mr. Partee would have been allowed to proceed.

Such a disparity of results, dependent upon the circuit in which a prisoner's habeas corpus petition is filed, and the manner in which the particular circuit defines "custody" of a prisoner ideally ought not be tolerated at all; assuredly the disparity ought not be permitted to flourish overly-long. As Chief Justice Marshall first noted, unlike the common law, where the court's power to issue a habeas writ was an inherent one, in the American system, judicial authority to grant the writ flows solely from the statutory grant. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 2 L. Ed. 554 (1807). The statutory grant of power in habeas cases filed by prisoners is contained in 28 U.S.C. § 2241(c)(3) which expressly obliges:

> The writ of habeas corpus shall not extend to a prisoner unless —
>
> * * *
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States.

Because the meaning of "custody" as the term is used in 28 U.S.C. § 2241(c)(3) is the threshold question central to each of the ever-increasing number of prisoner-petitions filed each year, it seems clear that in those federal circuits which have formulated an incorrect answer to the question left open by *Maleng v. Cook*, prisoners in those circuits are either:

> (a) regularly and repeatedly being denied habeas relief to which they have less-than-clear statutory entitlement,

or (as the case may be)

> (b) regularly and repeatedly being granted habeas relief which the congress has declared they should not be granted unless they are "in custody" under the judgment they seek to attack.

Moreover, 28 U.S.C. § 2254(a) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a State court only on the ground that he is in

custody in violation of the Constitution or laws or treaties of the United States.

Because 28 U.S.C. § 2254(a), provides the *exclusive* jurisdictional basis upon which, in criminal habeas matters, a federal judge is permitted to act, it seems clear that in those federal circuits which have formulated an incorrect answer to the question left open by *Maleng v. Cook*, judges in those circuits are regularly and repeatedly taking action on habeas petitions in the absence of any real jurisdiction to do so.

Whether the question of what constitutes "custody" is viewed in the context of 28 U.S.C. § 2241(c)(3) or in the context of 28 U.S.C. § 2254(a), the question left open by *Maleng v. Cook*, presently, and more strongly than ever, cries to be given a definitive answer; the matter of whether a prisoner is or is not in the "custody" which the statutes require ought no longer depend upon whether the federal circuit in which the prisoner's habeas petition is filed does or does not recognize *Custis* as having definitively, albeit implicitly, answered the question left open by *Maleng*.

III. RECENT CONGRESSIONAL ENACTMENTS WHICH PURPORT TO PLACE A STRICT ONE-YEAR TIME LIMITATION UPON APPLICANTS FOR FEDERAL HABEAS RELIEF TEND STRONGLY TO WARRANT A DEFINITIVE EXPRESSION FROM THE COURT AS TO WHETHER SUCH CONGRESSIONAL EXPRESSION SHOULD BE REGARDED AS INVEIGHING TOWARDS THE ANSWER TO THE QUESTION LEFT OPEN BY *MELANG v. COOK*.

The pertinent statutes, 28 U.S.C. §§ 2241 and 2254, do not expressly authorize collateral attacks on expired state sentences used in later sentencings. Instead the statutes provide for an action by a person "in custody in violation of the Constitution or laws or treaties of the United States."

Obviously, Congress intended the "custody" requirement to have its plain meaning, thereby restricting the class of cases to which habeas jurisdiction would extend; otherwise it would have provided for an action by a person claiming he *was convicted* in violation of the Constitution. If the "custody" requirement instead allows challenges to sentences on which a prisoner is *not* in custody, but which were simply used in a subsequent sentencing proceeding, then the plain meaning of the words used by Congress is being ignored and the statutory language has virtually no effect.

Recent changes[5] in the federal habeas statute emphasize the point. After long concern about stale attacks on state

5. 28 U.S.C. § 2244(d)(1) as amended Apr. 24, 1996, Pub. L. 104-132, Title I, §§ 101, 106, 110 Stat. 1217, 1220 now provides: (Cont'd)

convictions, Congress has now acted to require a prisoner to seek federal habeas review within one year after his conviction becomes final. The decision of the Third Circuit here, as well as the decisions of other circuits which do not regard *Custis* as having answered the question left open by *Maleng*, tend to create an enormous loophole in the amended statute by allowing review of expired sentences so long as the prisoner alleges a connection between present incarceration on a new offense and the prior conviction. Whatever benefits Congress hoped would flow from the 1996 amendment requiring expeditious review of state criminal proceedings will be largely illusory.

Despite the clear statutory scheme and the teaching of this Court's recent precedent the conflict between the circuits as illustrated earlier in this Petition (in connection with the direct and obvious conflict between the decision here and *Partee v. Hopkins*, *supra*) persists[6] and widens. It must be

(Cont'd)
"A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."

6. Like the Third Circuit in the present case, the Ninth Circuit does not read *Custis* as removing constitutional challenges to expired convictions from the purview of federal habeas courts in the context of a challenge to present custody. *Brock v. Westin*, 31 F.3d 887, 890 (9th Cir. 1994). *But c.f.*, *Clawson v. United States*, 52 F.3d 806 (9th Cir. 1995) (holding in proceeding under 28 U.S.C. § 2255 that, following *Custis*, there is no Constitutional right to collaterally challenge constitutionality of a prior conviction used to enhance sentence under ACCA for any reason other than *Gideon* violation).

The Eighth Circuit, in contrast, has held that *Custis* bars derivative habeas challenges despite the effect of a prior conviction

(Cont'd)

noted that some indefiniteness apparent in this Court's per curiam opinion in *Maleng v. Cook* may have contributed to the widening of the inter-circuit conflict of views:

(Cont'd)
on current custody, except where the claimed violation is deprivation of counsel. *Partee v. Hopkins*, 30 F.3d 1011, 1012 (8th Cir. 1994).

The Fifth Circuit had not directly addressed the issue prior to its 1998 decision of *Pleasant v. State of Texas*, 134 F.3d 1256 (5th Cir. 1998) which while not citing *Custis* appears to have been based upon reasoning similar to that employed by *Custis*. Previous to *Pleasant v. State of Texas* the Fifth Circuit had reiterated its pre-*Custis* view that derivative challenges may be maintained in habeas actions where jurisdiction is established by current custody. *Herbst v. Scott*, 42 F.3d 902 (5th Cir.), *cert. denied*, 115 S. Ct. 2590 (1995).

The Eleventh Circuit, without alluding to *Custis*, has continued to allow derivative collateral challenges in § 2254 actions. *White v. Butterworth*, 70 F.3d 573 (11th Cir. 1995).

The Seventh Circuit has taken a unique approach, holding that a prisoner claiming that a prior invalid conviction was used to enhance the sentence he is currently serving must be provided with an opportunity for a "fact-intensive" review on the merits of the prior conviction. If the prisoner has been provided with a full and fair opportunity to receive such review in state court, the federal court will not hear the challenge. If he has not been provided with such an opportunity, the federal court will entertain the claim in a habeas challenge to the current conviction. *Treadway v. Farley*, 35 F.2d 288 (7th Cir. 1994).

The First, Second, Fourth, Sixth, and Tenth Circuits do not appear to have revisited the question of derivative challenges in habeas actions since *Custis*. However, as previously noted, the First and Sixth Circuits have disallowed federal sentencing challenges to prior convictions, even where the defendant is not "in custody" for purposes of the prior convictions and has no other means to challenge them.

Maleng held that a state prisoner does not remain "in custody" under a conviction after the sentence imposed for it has fully expired merely because of the possibility [or even the actuality[7]] that the prior sentence will be used to enhance the sentence imposed for any subsequent crimes of which he is convicted. Yet the opinion then states that it "express[es] no view" on the extent to which an expired conviction could be challenged in the context of an attack on a current sentence.

What remains indefinite is how the Court's holding in *Maleng* is distinct from the point on which it purports to express no view. The only apparent reason for the prisoner in *Maleng* to have challenged an expired sentence was to escape a current sentence that was based on the expired sentence. If *Maleng* did not preclude such a challenge, it is unclear what it did do. *Custis* and the habeas statute itself (particularly through the congressional expression inherent in the amendment imposing a one year limitation) help to answer the question, but the circuits are still without sufficient guidance.

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7. The Court observed that

> [s]ince almost all states have habitual offender statutes, and many states provide . . . for specific enhancement of subsequent sentences on the basis of prior convictions, a contrary ruling would mean that a petitioner whose sentence has completely expired could nonetheless challenge the conviction for which it was imposed at any time on federal habeas.

490 U.S. at 492. The viability of the Court's observation as just quoted in light of the one year time limitation imposed by the 1996 amendment to 28 U.S.C. § 2244(d)(1) may deserve the Court's consideration.

To clarify the meaning of its precedent, to resolve inconsistency among the circuits, and to effectuate the controlling statute, this court should grant review.

CONCLUSION

For these reasons, petitioners respectfully request that a writ of certiorari issue to review the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED FEBRUARY 29, 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-7416

EDWARD R. COSS, JR.,

Appellant

v.

LACKAWANNA COUNTY DISTRICT ATTORNEY;
THE ATTORNEY GENERAL OF THE COMMONWEALTH
OF PENNSYLVANIA

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 94-cv-01481)
District Judge: Honorable Thomas I. Vanaskie

Argued March 1, 1999

Before: STAPLETON, RENDELL and ALDISERT,
Circuit Judges

Re-Argued: November 8, 1999

Before: BECKER, *Chief Judge*, SLOVITER, MANSMANN,
GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH,

Appendix A

McKEE, RENDELL, BARRY, ALDISERT and STAPLETON, *Circuit Judges.*

(Filed: February 29, 2000)

* * *

OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

Edward Coss appeals from the denial of his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. He is not challenging the merits of the state conviction for which he is presently incarcerated. Instead, he contends that because a former conviction for which he is no longer incarcerated or under any parole restraint was tainted by a constitutional infirmity, and that conviction was improperly considered when he was sentenced for his second offense, his current term of incarceration violates his constitutional rights.

We must first decide whether the conviction of his first offense was considered by the sentencing judge in the matter for which he is presently incarcerated, thereby vesting subject matter jurisdiction in the District Court for his present petition. If we find such jurisdiction we must then examine his first conviction to determine whether he was denied his Sixth Amendment right to competent counsel. If we agree with this contention then we must decide what remedy is available to him.

Appendix A

I.

The melancholy chronicle of events started with a simple assault and battery that took place on June 25, 1986, in the small community of Dickson City in Lackawanna County, Pennsylvania, when the local police were called to a high school graduation party at the home of Carol Ann Frank, the sister of the then seventeen-year-old Appellant, Edward Coss. At the District Court hearing, testimony was presented that Appellant attended the party along with his brothers, Jimmy and Bobby, Appellant's girlfriend, Sherry Kulick, Carol Ann's roommate, Lisa Frieto, and Lisa's brother, George Frieto. Most of the guests at the party consumed alcohol.[1] It seems that Carol Ann's roommate, Lisa Frieto, got into a hair pulling contest with Sherry Kulick, and thereafter the revelers, all of whom had been drinking, apparently picked sides and a grand donnybrook was had by all until Carol Ann, the hostess, threw everyone out of her house.

Undeterred by the great outdoors, the donnybrookers continued their carousing outside until the landlord and the neighbors called the police. When the cops arrived with their usual greeting, "Break it up," there apparently was a slight problem in attitude adjustment, and the cops say that Appellant threw a couple of punches at one of them, landing himself in the local lockup. Totally dissatisfied with the accommodations, Appellant proceeded to voice his complaint by destroying a radiator, a sink, a toilet and a light fixture on the ceiling in his cell. For this, he was convicted of simple

1. Although at his trial Appellant's story differed from the facts we recount here, the District Court clearly credited this version of events.

assault and institutional vandalism and sentenced to six months to a year on each offense. Appellant did his time and was released to society on parole.

Appellant met with his assigned attorney, Rose Ann McGowan, on two occasions before his trial. The District Court made the finding of fact that Appellant gave McGowan the names and addresses of several potential witnesses during their first meeting.[2] Counsel gave Appellant no notice of the trial date but contacted him approximately one hour before the trial was to begin, at which point Appellant drove directly to the courthouse, stopping only to pick up his brother Jimmy at school.

---

2. Appellant testified at the evidentiary hearing that in the first meeting, he and McGowan discussed "the whole entire story, how it happened, [and] who was involved." His second and final meeting with McGowan prior to his trial occurred after a severance motion, requesting that the charges in connection with the simple assault be severed from those filed for the damage to the juvenile detention center, was filed in September 1986. He alleges that he and McGowan also discussed the names of possible witnesses at this meeting. McGowan did not testify what occurred at these meetings. She did testify at the evidentiary hearing that Appellant did not give her the names of any witnesses he wanted her to subpoena, but then admitted that she did not specifically remember Appellant's case and was instead testifying based on her general practice as a public defender.

The court also noted that even if Appellant did not provide the names to McGowan at this time, a cursory review of the police reports would have identified the names and addresses of some of these witnesses.

Appellant's trial began on October 30, 1986 and lasted two days. At the trial, the officers who arrested Appellant, Officers Adamitis and Wrobel, testified that when they arrived at the scene, individuals began scattering and that they grabbed Appellant as he was running to his car. They testified that Appellant was screaming vulgarities and smelled of alcohol. They testified that, after being grabbed, Appellant began pushing Officer Wrobel and was then arrested. They also testified that as Officer Adamitis attempted to grab Appellant's brother Bobby, Appellant punched Officer Adamitis in the face. This punch is the basis for Appellant's simple assault conviction. Finally, Officer Wrobel testified that an individual named George also hindered their attempts to arrest Bobby.

The only witnesses to testify on Appellant's behalf were Appellant and Jimmy.[3] Their accounts of the incident on June 25, 1986 were completely different from the testimony adduced some years later at the District Court hearing. They denied (1) that there was a party at Carol Ann's house that night and (2) that Appellant had been drinking. They testified (3) that on the night in question, Jimmy and Appellant were in their sister's driveway, along with their brother Bobby, and had been there no more than fifteen minutes when two police officers arrived and began to assault Bobby and Appellant, (4) that Appellant did not curse or punch anyone and (5) that he did not know who the officer was referring to when he stated that an individual named George was at the

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3. McGowan did not suggest that Jimmy testify. Instead, Appellant, on his own initiative, brought Jimmy to the trial and asked him to testify. McGowan admitted that she did not subpoena, interview or prepare Jimmy.

scene. Jimmy corroborated this story, stating that there was no party at Carol Ann's, that they were only at Carol Ann's house to give her a camera, that he had not been drinking and that Appellant did not hit a police officer.

The charges ultimately presented to the jury were institutional vandalism and criminal mischief, simple assault, resisting arrest and disorderly conduct. The jury convicted Appellant of institutional vandalism, criminal mischief and simple assault.[4] Appellant was sentenced on January 30, 1987, receiving six months to one year on the simple assault charge and six months to one year on the institutional vandalism and criminal mischief charges. The simple assault sentence ran consecutively to the institutional vandalism and criminal mischief sentence. As stated previously, Appellant has already served his sentence for these convictions.

On August 30, 1989, seven or eight months after Appellant's discharge from Pennsylvania parole supervision, a certain Peter Petrovich was beaten "by a group of five or six men, including appellant."[5] Appellant was subsequently arrested and convicted on one count of aggravated assault and battery and one count of simple assault for his part in the group effort to register displeasure on Petrovich's person. Appellant was sentenced to a term of six to twelve years imprisonment on the aggravated assault conviction.

4. The institutional vandalism and criminal mischief result from Appellant's destruction of the detention cell and are not related to Appellant's interaction with the police outside of Carol Ann's house.

5. *See Commonwealth v. Coss*, 695 A.2d 831, 833 (Pa. Super. Ct. 1997).

Presently, he is serving a sentence based on charges from this 1990 conviction, unrelated to his 1986 convictions. Although he has served the term for the simple assault charge, Appellant urges that his claim is not moot because the assault charge was used to enhance his sentence from the 1990 conviction for which he is still incarcerated.

II.

On September 15, 1994, Appellant filed a pro se petition for writ of habeas corpus pursuant to § 2254. Appellant filed an original and amended petition on November 29, 1995, and a Second Petition for Writ of Habeas Corpus on November 7, 1996. In the petition Appellant claimed that he was denied his Sixth Amendment right to effective assistance of counsel during the proceedings leading up to his 1986 convictions based on, among other things, counsel's failure to subpoena any of the witnesses he requested.[6]

On April 20, 1998, an evidentiary hearing was held to address Appellant's ineffective assistance of counsel claims. At the hearing, each of the witnesses that Appellant stated he had identified to counsel, namely, Carol Ann, Bobby, Sherry, and George, testified that McGowan did not contact them regarding Edward's trial and that he did not strike any police officer. Bobby, Sherry, and George testified that there

6. Appellant also alleged that his counsel was ineffective for empaneling two jurors adverse to Appellant's interests, failing to have the institutional vandalism and criminal mischief charges dismissed and failing to file post-trial motions. The District Court dismissed these other bases of ineffective counsel and, *see infra* Section V, Appellant does not appeal their dismissal.

was a party and Edward was present, that someone had called the police and that the first thing that the police did upon arrival was approach Edward and place him in the back of one of the police cars. They testified that the police then chased after Bobby, at which point George jumped on the back of one of the officers to try to hinder his attempt to arrest Bobby. Thus, according to these witnesses' testimony, Appellant was in the police car the entire time the police attempted to arrest Bobby. According to the District Court, "McGowan's recollection of the case [at the evidentiary hearing] was somewhat sketchy."[7] She conceded during the

7. From a review of the evidentiary hearing transcript, we agree with the District Court's characterization of McGowan's memory of this case. At the evidentiary hearing, McGowan testified:

> Q. Ms. McGowan, is your testimony, today, based on actual recollection of this particular case, the Coss case, or are you testifying, based upon your general practice, as a Public Defender, when you were employed in the Public Defender's Office?
>
> A. It would — it would be in part, yes, and in part, no. Because certain portions that I've responded to, I have direct recollection. As I said, I have direct recollection — once I looked at the sentencing report, I had direct recollection, exactly, what had transpired. I mean, once Mr. Coss told Judge Cottone, according to the transcript, that he was thinking about an appeal, but they were telling him this, and then I just — I recalled. I do recall distinctly, exactly, that they — the they .. was advising him this way, and he would not listen to me, okay? When we wanted to file the Post-trial Motions

(Cont'd)

hearing that she did not investigate the events surrounding Coss' arrest, electing not to dispatch her investigator to interview any of the witnesses at issue, and defended her actions by stating that "Coss must have told her not to subpoena them." Dist. Ct. Op. at 16 (June 10, 1998).

Following the hearing, the District Court denied Appellant's ineffective assistance of counsel claims. The court held that, although McGowan's failure to subpoena these witnesses "fell below an objective standard of reasonableness," Appellant failed to prove that he was prejudiced by McGowan's failure because the verdict would

(Cont'd)

> on that, he did not want them. . . . That is direct recollection. Now, the other stuff may be general.
>
> . . . .
>
> Q. Ms. McGowan, what I'm asking you about is, do you, specifically, remember having this conversation with Eddie Coss about these witnesses or is your testimony that this is how you normally conduct yourself?
>
> A. No, no. No, no, no, it wouldn't be. I would have asked him what about these people, what about these, what about these? You know, what were they doing there or how are they related to this?

The questioning continued with McGowan answering the questions regarding her failure to subpoena the witnesses in the form of what she "would have" done or what Coss "must have" said, as distinguished from stating what she "did" or what Coss "said."

not have been different, given the inconsistency in the accounts of Appellant and his brother on the one hand, and the witnesses and the police on the other. Appellant appeals this decision of the District Court, arguing on appeal that the District Court erred in its application of the prejudice prong of the ineffective assistance of counsel test as stated in *Strickland v. Washington*, 466 U.S. 668 (1984).

III.

Our first inquiry is whether the sentencing court at the 1990 conviction took into consideration the 1986 conviction. The presentence report of the Lackawanna Adult Probation Office indicated that Appellant had been convicted on January 30, 1987 of Institutional Vandalism, Criminal Mischief and Simple Assault and was sentenced "[o]n the charge of Simple Assault 6 months to 1 years plus costs, consecutive to the Institutional Vandalism sentence." Pl.'s Ex. 5 at 5. On March 26, 1996, Appellant's counsel raised the question whether Appellant's 1986 convictions should count as one misdemeanor, rather than two. Pl.'s Ex. 2 at 5. A Mr. Mecca, ostensibly from the probation office, commented:

> To state that when the defendant committed a simple assault in Dickson City was at that time petitioned, charged, placed in juvenile detention, and the following day in Scranton, Pennsylvania, decided or was charged with institutional vandalism, destroying the cell he was in, to say that is one and the same act as a simple assault, which was followed by hours, if not a day of no

> criminal activity, to say that is one under the guidelines is an error, Judge."

Id. at 9.

At a continuation of the hearing the next day the judge ruled that he "will view these as being one transaction, one incident, one conviction, rather than two. Therefore, I will be viewing the defendant with a prior record score of two rather than three." Pl.'s Ex. 3 at 5. On April 28, 1993, the judge stated that in determining the sentence "we've taken into consideration your presentence investigation, the report . . . [and] your prior record . . . ." Pl.'s Ex. 1 at 6.

We are satisfied that the sentencing judge for the 1990 conviction took into consideration Appellant's simple assault conviction stemming from the events of June 25, 1986.

IV.

We must now decide whether the District Court had subject matter jurisdiction over this habeas petition. Section 2254 confers jurisdiction on United States District Courts to entertain petitions for habeas corpus relief only from persons who are "in custody" in violation of the Constitution or laws or treaties of the United States. The Supreme Court has interpreted § 2254 as mandating that the petitioner be "in custody" pursuant to the conviction or sentence he seeks to attack at the time his petition is filed. *See Carafas v. LaVallee*, 391 U.S. 234 (1968). A habeas petitioner does not remain "in custody" under a conviction "after the sentence imposed for it has fully expired, merely because of the

possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes of which he is convicted." *Maleng v. Cook*, 490 U.S. 488, 492 (1989) (per curiam). A petitioner does, however, satisfy the "in custody" requirement for federal habeas jurisdiction when he asserts a challenge to a sentence he is currently serving that has been enhanced by the allegedly invalid prior conviction. *Id.* at 493. Moreover, in *United States v. Tucker*, 404 U.S. 443 (1972), the Court held that a prisoner could attack in a federal habeas proceeding an allegedly unconstitutional conviction, even if he has served in entirety the sentence resulting from the conviction, if that conviction had an effect on a present sentence. *See also Young v. Vaughn*, 83 F.3d 72, 78 (3d Cir. 1996) (holding that "a prisoner may attack his current sentence by a habeas challenge to the constitutionality of an expired conviction if that conviction was used to enhance his current sentence").

Although Appellant has already served the sentence resulting from the allegedly unconstitutional 1986 convictions and is currently serving a sentence for an unrelated conviction that occurred in 1990, he contends that the sentence from his 1990 conviction was adversely affected by the 1986 simple assault conviction. We have concluded that the sentencing judge did, in fact, refer to Appellant's 1986 conviction for assaulting a police officer in sentencing him for his 1990 conviction. Appellant is thus attacking his prior conviction in an attempt to have his current sentence, which relied on his prior conviction, reevaluated. The District Court therefore appropriately construed Appellant's petition as challenging the 1990 conviction rather than his expired conviction, *see Young v. Vaughn*, 83 F.3d at 75, and properly

concluded that it had jurisdiction over his § 2254 petition. *Id.* We have appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253.

V.

Absent a valid excuse, a habeas petitioner must present all federal claims to the state courts. 28 U.S.C. § 2254(b); *Rose v. Lundy*, 455 U.S. 509 (1982). "The exhaustion requirement ensures that state courts have the first opportunity to review federal constitutional challenges to state convictions and preserves the role of the state courts in protecting federally guaranteed rights." *Evans v. Court of Common Pleas, Delaware County, Pa.*, 959 F.2d 1227, 1230 (3d Cir. 1992) (citing *O'Halloran v. Ryan*, 835 F.2d 506, 509 (3d Cir. 1987)). Of course, "[i]nexcusable or inordinate delay by the state in processing claims for relief may render the state remedy effectively unavailable" and exhaustion will be excused. *Wojtczak v. Fulcomer*, 800 F.2d 353, 354 (3d Cir. 1986).

Prior to filing his § 2254 petition, Appellant had a petition challenging his 1986 conviction pending under Pennsylvania's Post Conviction Hearing Act (PCHA), 42 Pa. Cons. Stat. § 9541, *et seq.* (amended 1988), for approximately seven years without any activity. Under these circumstances, the District Court excused the exhaustion requirement and we find no fault with that decision. Appellant has not, however, presented to the Pennsylvania state courts his claim that the invalid 1986 conviction was used to enhance his subsequent conviction in 1990, the conviction being challenged by the underlying habeas

petition. Nonetheless, we conclude that this is not a situation in which the District Court was faced with a mixed petition necessitating a dismissal under *Rose v. Lundy*. As was made clear by the Pennsylvania Supreme Court in *Commonwealth v. Ahlborn*, 548 Pa. 544, 699 A.2d 718 (1997), collateral relief is not available under either the Post Conviction Hearing Act or under the common law remedies of state habeas corpus or coram nobis for a petitioner who is not currently serving a sentence of imprisonment for the conviction he wishes to challenge, even if petitioner contends that collateral consequences stem from that conviction. Accordingly, insofar as state law clearly forecloses state court review of Appellant's "collateral consequence" claim, the District Court properly excused exhaustion and entertained the claim on its merit.[8] *See, e.g., Gibson v. Scheidemantel*, 805 F.2d 135, 138 (3d Cir. 1986) (citing *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (per curiam)).

VI.

Because Appellant submitted filings to the District Court both before and after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), we think it necessary to briefly discuss the law governing this action. We conclude that the amendments brought about by AEDPA do not apply to this case as Appellant's original petition and amendment were both filed prior to AEDPA's effective date. *See Lindh v. Murphy*, 521 U.S. 320 (1997); *McCandless v.*

8. We view *Commonwealth v. Ahlborn* not as erecting a "procedural bar," but as a statement that there is no available state remedy for the claim that the present sentence was incorrectly enhanced by an invalid prior conviction.

Vaughn, 172 F.3d 255 (3d Cir. 1999); *United States v. Skandier*, 125 F.3d 178 (3d Cir. 1997). Though Appellant did file a "Second Petition" in November of 1996, i.e., after the enactment of AEDPA, that petition did not add new claims, but merely waived, as was permitted by the District Court's order of October 23, 1996, those claims presented in his original petition that were determined by the District Court to be unexhausted. *See Rose*, 455 U.S. at 510 (petitioner may amend his petition to delete unexhausted claims); *McMahon v. Fulcomer*, 821 F.2d 934, 941 (3d Cir. 1987) (same). In fairness, we view Appellant's "Second Petition" filed after AEDPA as tantamount to a further amendment or clarification to his initial petition, filed at the direction of the District Court, which merely expressed Appellant's intention to proceed with his exhausted claims. Therefore, we consider all the claims raised as having been asserted in a petition filed prior to AEDPA's enactment date. *See also United States v. Duffus*, 174 F.3d 333, 336-337 (3d Cir. 1999) (discussing, *inter alia*, the "relation back" provision of Rule 15(c), Federal Rules of Civil Procedure and its application to clarifying amendments to habeas petitions). Accordingly, pre-AEDPA requirements govern. Appellant was obligated to obtain a certificate of probable cause in order to appeal from the District Court's judgment dismissing his habeas corpus petition.

The pre-AEDPA certificate of probable cause did not require specification of issues and placed the entire case before the court of appeals. *See Ramsey v. Bowersox*, 149 F.3d 749, 759 (8th Cir. 1998); *Herrera v. United States*, 96 F.3d 1010, 1012 (7th Cir. 1996); *see also United States ex rel. Hickey v. Jeffes*, 571 F.2d 762, 765-766 (3d Cir. 1978).

By contrast, the post-AEDPA certificate of appealability requires specification as to which issues satisfy the standard set forth in 28 U.S.C. § 2253(c)(2), i.e., those issues for which the applicant has made a substantial showing of the denial of a constitutional right. In the instant case, rather than granting Appellant a certificate of probable cause to appeal, the District Court granted Appellant a certificate of appealability limited to his claim that counsel rendered constitutionally ineffective assistance by failing to subpoena witnesses on the simple assault charge. Under pre-AEDPA law we determined that it is inappropriate for a District Court to prescribe the issues or issue which may be considered in support of or in opposition to a judgment and that Appellant is free to choose which claims to assert on appeal. *Hickey*, 571 F.2d at 766. Because Appellant, through his attorney, limited his request for a certificate on appeal to the one issue he believed to be of "arguable merit," that is, the ineffectiveness of counsel claim at issue, we see no reason to extend our review beyond the merits of that claim. Moreover, given our disposition of the appeal, we believe that an expanded review would make little difference.

VII.

We now reach the merits of Appellant's Sixth Amendment claim that he was denied effective assistance of counsel. Because his contention involves the legal component of an ineffective assistance of counsel claim, we exercise plenary review. *Parrish v. Fulcomer*, 150 F.3d 326, 328 (3d Cir. 1998).

To obtain relief based on an ineffective assistance of counsel claim, a petitioner must not only show that his

counsel's performance was objectively unreasonable, but also that it prejudiced his case. *Strickland v. Washington*, 466 U.S. at 692. The District Court determined that his counsel's failure to subpoena the witnesses at issue was objectively unreasonable, but denied relief because Appellant had failed to demonstrate prejudice.[9]

To prove prejudice under the second prong of the *Strickland* test, a defendant must "establish a reasonable probability — one sufficient to undermine our confidence in the outcome — that the jury's verdict would have been different if not for counsel's errors." *United States v. Gray*, 878 F.2d 702, 712 (3d Cir. 1989). The District Court reached its conclusion that Appellant had failed to demonstrate prejudice because the witnesses who testified at the evidentiary hearing painted a completely different picture of the incident leading to Appellant's arrest from that told by Appellant and his brother, Jimmy, at trial. The evidentiary hearing testimony made clear that on the night of the incident Appellant had been drinking at a party that had to be broken up by the police. This version of events is a far cry from Appellant's trial testimony of a calm, quiet visit by him and his brother sabotaged by two rogue police officers. Assuming that Appellant still would have testified and would have testified in the way that he did, the District Court reasoned

9. We are not asked to review the issue of the reasonableness of counsel's actions as justifiable or strategic decisions. Appellant's attorney claimed no tactical merit to her failures except to say that she must have done what Appellant wanted in not subpoenaing witnesses; nor does the Commonwealth contest the District Court's finding that her conduct "fell below objective standards of reasonableness."

that the failure to call these witnesses was not prejudicial to Appellant. It reasoned that their testimony, if offered, would only have suggested to the jury that Appellant was lying on the witness stand and that Appellant was drunk and excitable during the incident. Because this case turned on a credibility determination between Appellant and the officers, the District Court reasoned that Appellant could not have been prejudiced by counsel's failure to call witnesses who only would have contradicted Appellant's version of the facts, destroying his credibility with the jury.[10] The District Court thus concluded that the outcome of the trial would have been no different, that is, Appellant still would have been found guilty of assaulting the officer, absent counsel's failure to summon the other witnesses.

We disagree with the District Court. Although it is unlikely that a court can determine with certainty the result of the proceedings absent counsel's failure, we must examine the "breadth of the evidence" and determine whether the case would have come out the way that it did if the witnesses had been present. *United States v. Kauffman*, 109 F.3d 186, 191 (3d Cir. 1997). Having examined the evidence in this case, including the evidentiary hearing transcript, we conclude that a reasonable probability exists that had counsel subpoenaed

10. The District Court also considered that Carol Ann and Bobby's testimony would have been suspect since they are Coss' siblings, that Sherry's testimony would have been suspect since she was Coss' girlfriend, and that George Frieto's testimony, while seemingly beneficial to Appellant in that he testified that it was he who attacked the officer, is also not inconsistent with the officer's testimony that an individual named George, in addition to Appellant, tried to hinder Bobby's arrest.

the witnesses, Appellant would not have been found guilty of assaulting the officer.

As a result of counsel's failure to conduct an investigation into the events surrounding Appellant's arrest, only Appellant and his younger brother Jimmy testified in his defense. There can be little doubt that Appellant and Jimmy decided to try to conceal the fact that they had been drinking that evening because they were both underage. Regardless of Appellant's motivation to lie about the context of the incident provoking his arrest, however, both he and Jimmy testified that Appellant did not assault a police officer. At the evidentiary hearing held to investigate Appellant's ineffective counsel claims, Carol Ann, Bobby, Sherry and George all testified that there was a party at Carol Ann's house, that the people at the party were consuming alcohol, that a fight broke out, and that the police came to break it up. Most important, they all testified consistently that Appellant did not punch a police officer. Bobby, Sherry and George testified consistently that it was George who jumped on a police officer's back when the officer assaulted Bobby. Finally, they testified consistently that, at the time the officers arrested Bobby, which according to the officers is the time that Appellant punched the officer, Appellant was sitting in the police car with the door shut.[11] Thus, although the witnesses' rendition of what happened on the night in question conflicts in large part with Appellant's version at his trial, all accounts of the evening are consistent in their most significant respect — Appellant did not commit the assault alleged.

11. It is important to note that all witnesses at the evidentiary hearing were sequestered, thus bolstering the credibility of these witnesses' convincingly consistent versions of the critical events.

We believe that the District Court employed too narrow an approach in analyzing Appellant's claim of prejudice. When it reached the prejudice prong of the *Strickland* test, the District Court stated that " '[p]rejudice' to a defendant from the failure to call witnesses should be assessed *in the context of the other testimony presented by the defense witnesses*." Dist. Ct. Op. at 18 (June 10, 1998) (emphasis added). The District Court phrased as the critical question: would the result of the trial have been any different if, instead of only Appellant and Jimmy testifying, the other four witnesses had also testified in Coss' defense? In so framing this question, the court assumed not only that Appellant would still have testified on his own behalf, but also that he would have told the same tale that he did at trial.

Strickland teaches that a court consider "the totality of the evidence before the judge or jury" in determining prejudice. 466 U.S. at 695. "Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect." *Id.* at 695-696.

Here, counsel's error had a pervasive effect, altering the entire evidentiary picture at trial. The testimony of the witnesses not presented should not be considered as merely a hypothetical supplement to the evidence actually offered at trial, with the remainder of the trial presumed to unfold as it actually did. Considering the totality of the evidence, we believe that, had counsel subpoenaed the witnesses and heard from them their version of the events (including that, although the police were correct in their allegations, it was George, not Appellant, who assaulted the officer), she would

not have presented at trial all versions of the evening's events, including Coss' clearly fictional rendition. When we assume the reasonably probable outcome without counsel's ineffectiveness, we must also assume a scenario that envisions counsel's acting effectively.[12] The District Court should have realized and considered the different course that the trial would probably have taken had counsel acted in an objectively reasonable manner by subpoenaing and interviewing these witnesses, and then presenting a defense consistent with their testimony. Had counsel interviewed these witnesses, we believe that there is a reasonable probability that Appellant would not have testified at all, or that he would have testified consistently with the other witnesses, thus avoiding the contradictory testimony that troubled the District Court.

As the Court has emphasized, the prejudice inquiry also involves concepts of reliability and fairness. *See Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). We believe that counsel's failure to subpoena these witnesses was prejudicial. They would have testified as to Appellant's innocence to the simple assault charge. This strongly suggests that the outcome of the trial would not have been the same. In light

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12. As pointed out by Appellant, if counsel had put both Appellant and the witnesses at issue on the stand and presented an inconsistent theory of defense, that in itself could constitute ineffective assistance. *See Bland v. California Dep't of Corrections*, 20 F.3d 1469, 1479 (9th Cir. 1994). Of course, counsel cannot rely on *Bland* to say that it was proper for her to not offer the witnesses' testimony in her attempt to present a consistent theory of defense, because she did not interview these witnesses to ascertain any inconsistencies.

of the quantity of exculpatory evidence that was available yet not presented to the jury, we believe counsel's conduct made the result of the trial fundamentally unfair and unreliable. Appellant has thus met his burden under *Strickland* to prove that he was prejudiced by his counsel's failure to subpoena the witnesses at issue.

We, therefore, conclude that the District Court erred in denying the petition for a writ of habeas corpus.

VIII.

Finally, we must address what relief is appropriate. It has been suggested that, inasmuch as Appellant has already served his sentence under the tainted proceeding, the only relief available is to direct the Commonwealth to re-sentence Appellant for the 1990 conviction without any reference to the previous assault and battery conviction.

The normal relief that we grant in habeas corpus is to order that the habeas petitioner be freed, subject to the right of society to correct in a timely manner the constitutional error through a new state proceeding. It cannot be controverted that had Appellant filed his habeas petition during the period he was incarcerated or on parole from the first conviction and we decided that he had been deprived of his Sixth Amendment right to counsel, we would have accorded Pennsylvania the option of releasing him or correcting the infirmity by means of a new trial or other proceeding. *See, e.g.*, *Henderson v. Frank*, 155 F.3d 159 (3d Cir. 1998); *Barry v. Brower*, 864 F.2d 294 (3d Cir. 1988).

Here, however, we cannot "free" Appellant because he has already, in the vernacular, "done the crime and done the time." We are thus faced with the very nice question: Should we give society, here, the Commonwealth of Pennsylvania, the right to cure the Sixth Amendment constitutional defect or should we give the Appellant a free ride and have his second sentence declared invalid simply because he is a recidivist? In *Henderson*, we explained that "federal habeas power is limited, first, to a determination of whether there has been an improper detention by virtue of the state court judgment; and second, if we find such an illegal detention, to ordering the immediate release of the prisoner, conditioned on the state's opportunity to correct constitutional errors that we conclude occurred in the initial proceedings." 155 F.3d at 168.

Appellant contends that where a previously infirm conviction has been used to enhance the sentence in a subsequent criminal case, the only remedy available to a federal court is to require the state to re-sentence under the second conviction and deny it the opportunity to correct the constitutional infirmity in the previous case. He relies on a series of cases which we now examine.

Appellant's primary reliance is on the teachings of *United States v. Tucker*, 404 U.S. 443 (1972). We do not deem this to be an appropriate analogue to this case or any other federal habeas case brought under § 2254. By caption and by content *United States v. Tucker* was not a habeas corpus case brought under § 2254 based on a *state* conviction. There the defendant was seeking post conviction relief from a *federal* conviction pursuant to 28 U.S.C. § 2255. This is a

distinction with a fundamental difference. The Court could not possibly condition relief on affording any state the opportunity to retry the defendant because no state officials were parties to the lawsuit. No state wardens, custodians or state officers were respondents or defendants as in the case of a § 2254 petition. In bringing his action, Tucker was attacking a federal sentence imposed by the District Court for the Northern District of California that had been enhanced on the basis of invalid state court convictions from Florida and Louisiana. Because the Court had no state officers as petitioners or respondents before it, the Court lacked power or authority to give the option to a state court in Florida or Louisiana to retry the defendant. To prevent the "erosion of the *Gideon* principle" that the right to effective assistance of counsel is fundamental, the Court had no alternative other than to order that the defendant be re-sentenced on the federal conviction without reference to the invalid state court convictions.[13] In contrast, in every habeas petition brought under § 2254, an officer of the state or a political subdivision thereof is *always* the respondent. The teachings of *Tucker*

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13. The Court's discussion is specifically targeted to a § 2255 case:

> [T]he real question here is not whether the results of the Florida and Louisiana proceedings might have been different if the respondent had had counsel, but *whether the sentence in the 1953 federal case might have been different* if the sentencing judge had known that at least two of the respondent's previous convictions had been unconstitutionally obtained.

404 U.S. at 448 (emphasis added).

reflect one exception to the general rule of permitting the state to correct the constitutional infirmity in a subsequent sentence enhancement case — where the federal court lacks the authority to afford the state the opportunity to correct the constitutional infirmity because no state officer is a party to the litigation. We now turn to other exceptions reflected in the cases.

This court has held that where a return to the state for additional proceedings "would be virtually impossible" under the circumstances, the federal court in a § 2254 case may simply order re-sentencing on the subsequent conviction without affording the state an opportunity to cure the previous constitutionally infirm conviction. *See Clark v. Commonwealth*, 892 F.2d 1142 (3d Cir. 1989). *Clark* was a deprivation of due process case lodged against a prior conviction that served to enhance the sentence for a subsequent offense. The gravamen of the petitioner's complaint was that in 1974, when Clark was 17 years of age, he was denied a juvenile court hearing to determine whether he should have been tried as a juvenile or as an adult. We determined that this denial constituted a due process violation, reversed the district court and granted relief, and, without elaboration at this point in the opinion, ordered that "the matter must be remanded for re-sentencing on the 1979 conviction without consideration of the prior offenses." 892 F.2d at 1153. Nevertheless, earlier in our opinion, recognizing that at the time we heard this appeal in 1989, the petitioner was 31 years old, there is a statement of reasons supporting our determination of the proper relief. Although set forth in our discussion of a portion of the Pennsylvania Post-Conviction Hearing Act, we commented that "both the

delay, 16 years since the alleged due process violation, and the prejudice . . . are present. . . . Given the death of the trial judge and the destruction of the relevant stenographic notes, to now defend against this issue in a collateral proceeding would be virtually impossible. . . . To return to the Pennsylvania courts would thus be futile." 892 F.2d at 1148-1149. Moreover, before us and in the district court the Commonwealth gave no indication that it wished to pursue further proceedings in the constitutionally infirm 1974 prosecution. The only relief possible was to order a re-sentencing on the subsequent conviction without enhancement. Thus, *Clark* reflects a second exception to the general rule permitting the state to exercise the option of additional proceedings.

In addition, a defendant could not be retried by the state where the trial never should have been held because of a serious constitutional violation such as denial of a right to a speedy trial. *Barker v. Wingo*, 407 U.S. 514, 522 (1972). *Barker* teaches that:

> [T]he [speedy trial] right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the only possible remedy.

Id. (emphasis added). The Court also teaches that dismissal is the only remedy for violation of the double jeopardy

principle. In *Benton v. Maryland*, 395 U.S. 784, 795-796 (1969), the Court remarked:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. (quoting *Green v. United States*, 355 U.S. 184, 187-188 (1957)).

An example of a double jeopardy problem would arise if a petitioner were successful in a case like *Jackson v. Virginia*, 443 U.S. 307 (1979). In *Jackson*, the petitioner claimed in a habeas corpus proceeding that he had been convicted on constitutionally inadequate evidence. The Court held that the petition would be granted if "upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.* at 324. Had the petition been granted in that case, the state could not retry the petitioner because it would violate his right against double jeopardy. *See also Burks v. United States*, 437 U.S. 1, 11 (1978) ("The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials.").

Another situation where a defendant cannot be retried is when a writ is granted because the state denied the petitioner due process of law by suppressing or destroying exculpatory evidence that no longer can be reconstructed. *See Brady v. Maryland*, 373 U.S. 83 (1963). If the prosecution were to not only withhold exculpatory evidence in violation of *Brady*, but also destroy it, a defendant could never receive a fair trial. The defendant could never produce the totality of the evidence in his or her defense because of the constitutional violations. In this instance, the only constitutional remedy would be unconditional granting of the writ.

There is no parallel between the case at bar and those cases where courts have determined that states should not be entitled to retry the petitioner.

* * * * *

Therefore, we will condition the entry of the writ by extending to the Commonwealth the option of conducting a new trial. If this new trial produces a verdict different from the prior verdict, the state must re-sentence Appellant to account for any enhancement due to this guilty verdict.[14] The

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14. Even if the Commonwealth elects to retry Coss, he will have to be re-sentenced regardless of the outcome. Even if a valid conviction is forthcoming on the earlier charge, nothing changes the fact that his current sentence was enhanced by an unconstitutional violation. A vacated conviction is not the same conviction as one that occurs after *vacatur*. Thus, in the event of a valid conviction, he would still have to be re-sentenced on the subsequent offense in light of new proceedings on the earlier offense.

(Cont'd)

Commonwealth also has the option of not affording a new trial and merely proceeding into re-sentencing on the 1990 conviction.

For the reasons stated above, we will reverse the judgment of the District Court that denied the petition for a writ of habeas corpus and remand with instructions that it issue a writ of habeas corpus conditioned on the foregoing options available to the Commonwealth.

(Cont'd)

We hold only that a retrial on the earlier offense would not violate the Federal Constitution and that comity requires us to afford the Commonwealth the opportunity to cure the original constitutional defect. We express no opinion on whether such a retrial would be consistent with Pennsylvania law. Moreover, if there is a conviction on retrial of the earlier offense, the Double Jeopardy Clause requires that the time he has already served on the original 1990 sentence be credited against the new sentence. *North Carolina v. Pearce*, 395 U.S. 711, 718-719 (1969) ("If, upon a new trial, the defendant is acquitted, there is no way the years he spent in prison can be returned to him. But if he is reconvicted, these years can and must be returned — by subtracting them from whatever sentence is imposed."), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989).

Appendix A

NYGAARD, *Circuit Judge*, dissenting.

I agree with much of the majority's opinion. Indeed, I agree that Coss was denied effective assistance of counsel during his 1986 trial for simple assault, and that his subsequent conviction on that charge is constitutionally infirm as a result. I part company with the majority over the question of whether the challenged sentence "might have been different if the sentencing judge had known that at least [some] of the respondent's prior convictions had been unconstitutionally obtained." *United States v. Tucker*, 404 U.S. 443, 448 (1972). On this record, I have no doubt that the sentencing judge would have imposed exactly the same sentence had he known Coss' 1986 conviction for simple assault was constitutionally infirm. Therefore, I respectfully dissent from that portion of the majority's opinion holding that Coss is entitled to habeas relief. Because I conclude that no relief is due, I express no view on the propriety of the majority's remedy.

This is at least the third time that Coss has asked a court to review the sentence arising from his 1990 conviction for simple and aggravated assault. The first time, the Pennsylvania Superior Court "vacated the sentence because it was not clear that the presentence report was accurate" and remanded the case for resentencing. *See Commonwealth v. Coss*, 695 A.2d 831, 833 (Pa. Super. 1997) (mem) (citing *Commonwealth v. Coss*, 674 A.2d 313 (Pa. Super. 1996)).

At his resentencing hearing, Coss challenged both the gravity assigned to his aggravated assault conviction, and its enhancement based on his criminal record. *See id.* The

Appendix A

sentencing court agreed that his three misdemeanor convictions in 1986 all arose from the same action and, accordingly, reduced his prior record score from 3 to 2. *See id.* The effect of the adjustment was to eliminate the 1986 convictions from Coss' prior record score entirely. The post-adjustment score of 2 was based solely on Coss' 1985 adjudication of delinquency. *See id.* at 835. Despite making the adjustment, however, the court resentenced Coss to the same six-to-twelve-year sentence it had originally imposed. That sentence remained within the standard range provided by the state sentencing guidelines even after the prior record adjustment, and the court found no reason for a downward departure. *See id.* at 833-34.

In resentencing Coss to the same sentence it had originally imposed, the sentencing court considered a number of different factors. In explaining the sentence for the record, the court informed Coss that:

> in passing sentence on you I've taken into consideration the presentence investigation report, and I've deleted therefrom all the remarks through the matter brought to my attention by [defense counsel] and I will not consider those matters.
>
> I've taken into consideration the statements by [defense counsel] and the seriousness and nature of the crime involved here, the well being and protection of the people who live in our community, your prior criminal record, the possibility of your rehabilitation, and the testimony that I've heard. I was the trial judge,

> and I take into consideration the testimony from the trial.

Sentencing Transcript of 03/27/1996 at 4-5, *reproduced in* Supp. App. at 243-44.

I would not deny Coss the relief he seeks merely because his prior criminal record was only one of many factors on which the sentencing court based its decision. Instead, I would deny relief because his 1986 simple assault conviction is such a minor component of that record that there is no question that the sentencing court, given its concerns, would have imposed exactly the same sentence in any event.

Given the nature of Coss' appeal, it is certainly understandable that the focus of attention has been on the challenged 1986 conviction for simple assault. But I take a broader view and include the extensive criminal record that Coss has managed to compile. It starts with a 1980 arrest, when Coss was 11 years old, for recklessly endangering another person. *See* Presentence Investigation Report at 4, *reproduced in* Supp. App. at 258. Thereafter, Coss was adjudicated delinquent on five separate occasions (when he was 12, 13, 15 and 16 years old) for, respectively: (1) theft and receiving stolen property; (2) disorderly conduct and resisting arrest; (3) simple assault; (4) yet another simple assault; and (5) burglary. *See id.*

As an adult, Coss has been convicted on the aggravated and simple assault charges for which he is currently imprisoned. In separate incidents, he has pleaded guilty to disorderly conduct after being charged with that offense, as

well as with hindering apprehension, in 1989. He also pleaded guilty to possession of a controlled substance in 1992 after being charged with that offense, and with reckless endangerment in 1991.

In addition, Coss' record at the time of sentencing included:[1]

(1) a 1986 arrest for making terroristic threats;

(2) a 1988 arrest for aggravated assault and simple assault;

(3) a 1988 arrest for delivery of a controlled substance (heroin);

(4) a 1989 arrest for aggravated assault, simple assault, recklessly endangering another person and disorderly conduct;

(5) another 1989 arrest for aggravated and simple assault;

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1. Under Pennsylvania law, a sentencing court may consider prior arrests in an offender's record, that did not result in convictions, "so long as the court realizes that the defendant had not been convicted on those prior charges," and does not give them "undue weight." *See Commonwealth v. Craft*, 450 A.2d 1021, 1024 (Pa. Super. 1982) (citing *Commonwealth v. Straw*, 361 A.2d 427 (Pa. Super. 1976); *Commonwealth v. Tisdale*, 334 A.2d 722 (Pa. Super. 1975); *Commonwealth v. Shoemaker*, 313 A.2d 342 (Pa. Super. 1973), *aff'd* 341 A.2d 111 (1975)); *see also Commonwealth v. Allen*, 489 A.2d 906, 912 n.4 (Pa. Super. 1985).

(6) yet another 1989 arrest for simple assault as well as for making terroristic threats;

(7) a 1990 arrest for simple assault and retail theft; and

(8) a 1990 arrest for retail theft and criminal conspiracy;

See id. at 5-7.

The 1996 sentencing court was intimately familiar with Coss, with the charges on which he had been convicted, and with his criminal record. It had the opportunity to hear the evidence against Coss at trial. It had the opportunity to hear from Coss at sentencing. *See* Sentencing Transcript of 04/28/1993 at 4-5, *reproduced in* Supp. App. at 199-200. Most importantly, it had the relatively rare opportunity to reconsider its decision when the original sentence was vacated on appeal. Yet, the court chose to impose the same sentence it had initially imposed, finding "no reason" for a reduction. *See* Sentencing Transcript of 03/27/1996 at 26, *reproduced in* Supp. App. at 244.

In finding no reason to reduce Coss' sentence, the court found it "indicative from [Coss'] actions" that he would "continue to break the law." *Id.* Given the extensive and often violent nature of Coss' criminal record, I find it impossible to conclude that the sentencing court's concerns for "the well being of the people who live in our community" and the "possibility for [Coss'] rehabilitation" would have been allayed by the omission of his 1986 conviction for simple

assault from his criminal record. Because I am certain that the sentencing court would not have sentenced Coss differently had it known that one conviction was constitutionally infirm, I respectfully dissent from the majority's conclusion to the contrary.

Judge Roth joins in this dissenting opinion.

RENDELL, *Circuit Judge*, concurring in part and dissenting in part:

I concur with the reasoning and result of the majority opinion in all respects except its discussion of the relief to be afforded to Eddie Coss as set forth at Part VIII. I believe that Part VIII of the majority opinion proceeds from an erroneous premise about a "general rule" to be followed in habeas cases challenging a sentence enhancement, *ante* at 19, 20, and then, as a result, asks the wrong question about what relief is appropriate in this particular case.[1] I conclude that: (1) a "general rule" favoring retrial does not exist in subsequent sentence enhancement cases; (2) for reasons of prudence and comity, the better alternative in this case is to condition our writ only on the Commonwealth court's *resentencing* Coss on his 1990 conviction; and (3) such a writ would not provide an untoward "windfall" to the petitioner.

The majority's discussion of remedy begins with the unobjectionable proposition that "[t]he normal relief that we grant in habeas corpus is to order that the habeas petitioner be freed, subject to the right of society to correct in a timely manner the constitutional error through a new state proceeding." *Ante* at 18. I take no issue with this statement, nor do I disagree with the majority's assertion that, in § 2254 cases, there is a "general rule of permitting the state to correct

1. This "nice" question, *see ante* at 18, is: "Should we give society, here, the Commonwealth of Pennsylvania, the right to cure the Sixth Amendment constitutional defect or should we give the Appellant a free ride and have his second sentence declared invalid simply because he is a recidivist?"

the constitutional infirmity," and that this rule extends to subsequent sentence enhancement cases as well as other habeas cases. *Ante* at 19.

However, the majority then makes an unarticulated leap of logic that I cannot accept, transforming its general rule that the state should be permitted to correct its constitutional error into a "general rule" that the state should be permitted *retrial* as the method for this correction whenever possible. This latter rule simply does not exist. It is true, as the majority observes, that in an *ordinary* habeas case — one in which the confinement that gives rise to the § 2254 petition stems directly from the conviction that is alleged to be deficient — the writ normally granted is a conditional writ allowing the state to retry the defendant. This is because, in garden-variety habeas cases, the "constitutional infirmity" being complained of lies in the conviction being challenged. In contrast, in a situation involving an improperly enhanced sentence, it is the latter sentence itself that is the basis for our jurisdiction and that is the "constitutional infirmity" complained of. *See Maleng v. Cook*, 490 U.S. 488, 490 (1989) (per curiam) (stating that a habeas petitioner in an enhancement case is not "in custody" on the earlier expired sentence, but rather is "in custody" only on the subsequent enhanced sentence); *Young v. Vaughn*, 83 F.3d 72, 75-76 (3d Cir. 1996) (stating that we have jurisdiction in a *Maleng*-type case only because the habeas petition is construed as challenging the subsequent enhanced sentence rather than the underlying conviction, and pointing out that "the purpose of [petitioner's] petition is presumably to terminate the sentence he is presently serving"). Accordingly, while I agree that we should "permit the state to correct the constitutional

infirmity," I believe that this goal is to be accomplished by conditioning our writ on the state's *resentencing* Coss in a manner consistent with the knowledge that his 1986 conviction was obtained without the effective assistance of counsel. Such a writ, which would instruct the state to release Coss unless it resentences him in a fashion that accords with our determination that the use of the 1986 conviction as a sentencing enhancer was improper and rendered his sentence unconstitutional, is an exact parallel to the conditional writ in an ordinary habeas case, which instructs the state to release the petitioner unless it repeats the offending process in a way that accords with the reviewing court's determination that some aspect of that process was constitutionally infirm.

The majority asserts that cases such as *Tucker*[2] and *Clark*[3] are exceptions to a general rule that the state should be permitted retrial whenever possible, even in the sentencing enhancement scenario. However, the majority has not been able to point to one enhancement case in which a habeas court has ordered retrial on the initial charge, or even suggested retrial as a potential form of relief. Nowhere in the case law is there support for the proposition that *Tucker* was conceived as an exception to a general rule of retrial applicable in sentence enhancement cases.[4] Although it is

2. *United States v. Tucker*, 404 U.S. 443 (1972).

3. *Clark v. Pennsylvania*, 892 F.2d 1142 (3d Cir. 1989).

4. Cases cited by the majority such as *Henderson v. Frank*, 155 F.3d 159, 162 (3d Cir. 1998), which ordered a writ conditioned on retrial, and *Barry v. Brower*, 864 F.2d 294, 296 (3d Cir. 1988), (Cont'd)

true that *Tucker*, unlike the instant case, addresses the use of earlier state convictions as invalid enhancements of a *federal* sentence, there is no evidence either in *Tucker* itself or in subsequent cases citing *Tucker* that *Tucker* is limited to cases arising from § 2255 petitions. The majority quotes an excerpt from *Tucker* as support for the theory that *Tucker* is so limited, *see ante* at 19 n.13. However, the majority has omitted the lines immediately preceding that excerpt, which clearly point in the opposite direction. The full content of the relevant passage is instructive:

> We need not speculate about whether the outcome of the respondent's 1938 and 1946 prosecutions would necessarily have been different if he had had the help of a lawyer. Such speculation is not only fruitless, but quite beside the point. For the real question here is not whether the results of the Florida and Louisiana proceedings might have been different if the respondent had had counsel, but whether the sentence in the 1953 federal case might have been different if the sentencing judge had known that at least two of the respondent's previous convictions had been unconstitutionally obtained.

(Cont'd)
which ordered a writ conditioned on re-appeal (the relief granted in *Barry* was re-appeal because the violation in question occurred in the appellate proceeding), simply do not present the same situation as the instant case; *Henderson* and *Barry* are not sentence enhancement cases and only involve the "garden-variety" habeas scenario. Similarly, the double jeopardy and other non-sentence enhancement cases cited by the majority do not resolve the question before us.

Tucker, 404 U.S. at 447-48. In other words, the relevant inquiry is *not* an inquiry into the prior convictions themselves; the Supreme Court's characterization of such speculation as being "quite beside the point" suggests that the convictions are not the appropriate targets of our relief. Rather, as *Tucker* states, the "real question" is whether the result of the *sentencing* proceeding is suspect. I cannot accept the majority's statement that *Tucker*'s import is somehow limited to § 2255 petitions. *Tucker* simply does not present itself as an exception to a general rule. Nor has our Court's jurisprudence understood *Tucker* as such.[5] Rather, *Tucker* appears to reflect a background assumption that resentencing — providing the sentencing court with the opportunity to correct the infirm sentence that was attacked in the habeas petition — is the appropriate remedy in habeas challenges to sentence enhancements.

Many federal appellate cases, including some of our own, support the basic concept that resentencing is the default form

5. Third Circuit case law clearly states that *Tucker* itself is applicable beyond the § 2255 context. In *Clark*, a § 2254 enhancement case, we made several references to the fact that *Tucker* was the governing precedent. *See Clark*, 892 F.2d at 1144 ("Thus, under the mandate of United States v. Tucker, the matter must be remanded for resentencing of the 1979 conviction with instruction that the 1974 convictions, obtained in violation of Clark's constitutional right to due process, not be considered in the imposition of the sentence.") (citation omitted); *id.* at 1149 n.10 ("The only relief permitted under Tucker is resentencing on the subsequent conviction."); *id.* at 1150 ("Because the 1974 convictions were relied upon by the 1980 sentencing court, Clark is entitled to the relief provided by Tucker and must be resentenced."). That is, we not only afforded resentencing as the relief in a § 2254 case, but also explicitly stated that *Tucker* controls § 2254 as well as § 2255 cases.

of relief in habeas challenges to invalid sentence enhancements. The law of our Court is actually quite clear on this point. In *Clark*, we held that where a Pennsylvania sentencing judge wrongly considered two previous Pennsylvania convictions obtained while Clark was a juvenile but without appropriate juvenile procedures, the appropriate relief on Clark's § 2254 petition challenging the enhanced sentence was resentencing on the later, wrongfully enhanced charge. *See Clark*, 892 F.2d at 1143-44. In its references to resentencing as the proper remedy, *Clark* is replete with language about "mandates" and "musts,"[6] and refers to resentencing as "[t]he only relief permitted under Tucker." *Id.* at 1149 n.10. The majority's efforts to explain *Clark* away on the basis that the sixteen years that had passed since the prior trial made retrial in *Clark* impracticable are unavailing; these arguments would be equally applicable to Coss's case, in which retrial would require reopening of a simple assault case whose events took place nearly fourteen years ago. Other Courts of Appeals have apparently assumed resentencing as the relief in sentence enhancement cases, and indeed the Seventh Circuit Court of Appeals has specifically read *Tucker*'s holding to extend to § 2254 cases. *See, e.g.*, *Crank v. Duckworth*, 905 F.2d 1090, 1090 (7th Cir. 1990) ("Tucker holds that 'misinformation of constitutional magnitude' — that is, reliance on an invalid prior conviction — authorizes relief from the current sentence.") (citation omitted);[7] *Feldman v. Perrill*, 902 F.2d 1445, 1449-50

6. See, for example, the three excerpts from *Clark* quoted in note 5 above.

7. *Crank*, like the instant case, is a § 2254 petition case in which both the prior, allegedly flawed conviction and the subsequent

(Cont'd)

(9th Cir. 1990) (stating that if the challenged prior conviction is indeed flawed, the appropriate remedy shall be a remand to the Parole Commission for a recomputation of the petitioner's parole eligibility on the later offense without consideration of the challenged conviction);[8] *see also Smith v. Farley*, 25 F.3d 1363, 1368 n.10 (7th Cir. 1994) (stating that a petitioner challenging a wrongly enhanced sentence would not be seeking to set aside his original conviction as constitutionally invalid, but would merely be challenging "the constitutionality of his conviction as used to enhance his present sentence"). In fact, Justice Souter has described the "uniform appellate case law" in this area as suggesting that the wrongly enhanced sentence, not the prior conviction, is the target of the habeas petition. *See Custis v. United States*, 511 U.S. 485 (1994) (Souter, J., dissenting) (joined by Blackmun and Stevens, JJ.) (pointing out that the *Custis* majority's holding "does not disturb uniform appellate case law holding that an individual serving an enhanced sentence may invoke federal habeas to reduce the sentence to the extent it was lengthened by a prior unconstitutional conviction"). At the very least, I think it clear that the appellate

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(Cont'd)
sentence that relied on that conviction as an enhancement were state offenses (both the initial and subsequent *Crank* convictions were Indiana state convictions).

8. Although *Feldman*, like *Tucker*, addresses the use of a flawed previous state conviction in a subsequent federal proceeding, nothing in *Feldman* suggests that reaching back to the original conviction would be appropriate in any sentence enhancement case. The Ninth Circuit Court of Appeals noted that *Feldman* was "indistinguishable from Maleng," a § 2254 case. *Feldman*, 902 F.2d at 1448.

case law dispels any notion of a "general rule" favoring retrial on the previous conviction in an enhancement case.

I think it equally clear that resentencing is the appropriate remedy in this case, for several reasons implicating both judicial prudence and comity. First, I am not convinced that we even *can* afford the relief suggested by the majority. Having served his entire sentence on the original 1986 conviction, Coss clearly is not "in custody" on that charge, *see Maleng*, 490 U.S. at 490, and therefore would not have recourse to the remedy of retrial through a habeas petition at this point. It is unclear to me that we have the power to provide that same relief, the benefits of which are unavailable to the *petitioner* in a habeas petition challenging a subsequent enhanced sentence, to the *respondent* in that same petition. I have found no federal case that addresses this question,[9] and I believe that we should not reach out to decide this issue unnecessarily when we can instead choose the well-established option of simply conditioning our writ on the Commonwealth's resentencing Coss on the 1990 conviction.

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9. A leading treatise on federal habeas procedure notes that *Maleng* left open this very question. *See* 1 James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure § 8.2c, at 333 n.20 (3d ed. 1998) ("*Maleng* . . . left open . . . [the] question whether, in the process of voiding a current sentence enhanced on the basis of an unconstitutionally imposed prior conviction as to which custody has terminated, the prior conviction 'itself' may be voided, thus depriving it of other collateral consequences in addition to its effect on the sentence currently being served.") (citing *Maleng*, 490 U.S. at 493-94).

In addition, I believe that the comity concerns raised by the majority argue in favor of relief limited to resentencing. It is difficult to determine what ramifications the relief mandated by the majority will have on the 1986 state conviction. I am not certain exactly what it means to give a state an "opportunity" to retry a defendant in this context; I cannot fit the majority's proposed relief into any proper procedural parlance. Are we vacating the underlying 1986 conviction? Are we overturning it? It seems that in order to allow the state to retry Coss, we must essentially declare the 1986 conviction, which is not the subject of the current petition, invalid for all purposes. This seems to me a far more extensive intrusion on the state's criminal process than the alternative of merely declaring that that conviction cannot be used to enhance the sentence at issue in Coss's habeas petition. Thus, the principle that federal habeas courts should generally grant the relief that "require[s] the least intervention into the state criminal process," *Henderson v. Frank*, 155 F.3d 159, 168 (3d Cir. 1998), suggests that conditioning the writ on resentencing is the appropriate option here.[10] Several cases

10. Contrary to the majority's assertion, *Henderson*'s guidance that federal habeas power is seemingly limited "first, to a determination of whether there has been an improper detention by virtue of the state court judgment; and second, if we find such an illegal detention, to ordering the immediate release of the prisoner, conditioned on the state's opportunity to correct constitutional errors that we conclude occurred in the initial proceedings," *Henderson*, 155 F.3d at 168, argues in favor of conditioning the writ on resentencing on the 1990 charge rather than on the possibility of retrial on the 1986 charge. The "detention" complained of by Coss (indeed, the only detention he suffers) is the detention resulting from the 1990 sentence, and thus the relevant proceedings that the state should have the opportunity to correct are the sentencing proceedings, not the 1986 conviction.

decided by the Seventh Circuit Court of Appeals have explicitly found that comity concerns are implicated less by resentencing than by a reopening of the initial state conviction.[11] *See, e.g.*, *Crank*, 905 F.2d at 1091 ("We did not decide in Lowery whether the federal court could invalidate the prior conviction for all purposes or only for the purpose of the particular sentence then being served, an important distinction if the state rendering the original judgment retains an interest in its validity."); *Smith*, 25 F.3d at 1368 n.10 (finding that "merely . . . challeng[ing] the constitutionality of [the earlier] conviction as used to enhance his present sentence" implicates comity less directly than would "set[ting] aside the [earlier] conviction as constitutionally invalid"). Furthermore, as previously noted, Coss has served the full sentence imposed on him by the Commonwealth for the 1986 conviction, reducing any possible interest that the state might have in retrying him.[12]

11. As noted in the majority opinion, the majority's choice of relief would require resentencing on the 1990 charge regardless of the Commonwealth's decision whether to pursue a retrial on the 1986 charge, and regardless of the outcome of such a retrial should it occur. *See ante* at 22 n.14. Thus, the limited intrusion on state process that is presented by resentencing will occur regardless of which relief we choose to fashion — the relief ordered by the majority as well as the relief that I would propose.

12. *See Feldman v. Perrill*, 902 F.2d 1445, 1450 (9th Cir. 1990) (stating that, because the petitioner who challenges a later sentence enhancement is no longer in custody on the initial flawed conviction, the state rendering that initial conviction "has extracted its punishment and has no further interest in petitioner"). We need not go as far as *Feldman*'s statement that the state's interest in the initial conviction is *eliminated*. However, the fact that Coss has served his full sentence on the 1986 conviction clearly greatly reduces the Commonwealth's interest in that conviction.

The majority's contention that comity is fostered by its choice of relief is further weakened by the fact that the Commonwealth of Pennsylvania has already had the opportunity to address the validity of the 1986 conviction, and declined to do so. As Part V of the majority opinion discusses, *see ante* at 10, Coss presented the Commonwealth with an attack on his 1986 conviction in a petition pursuant to Pennsylvania's Post Conviction Hearing Act (PCHA), 42 Pa. Cons. Stat. § 9541 *et seq.* (now known as the Post Conviction Relief Act). Prior to Coss's filing his § 2254 petition in federal court, the state PCHA petition had been pending for approximately seven years without any activity.

Pennsylvania's inaction also highlights one aspect of the inaccuracy of the "nice" question posed by the majority, *see ante* at 18: "Should we give society, here, the Commonwealth of Pennsylvania, the right to cure the Sixth Amendment constitutional defect or should we give the Appellant a free ride and have his second sentence declared invalid simply because he is a recidivist?" I submit that any "right" to cure the Sixth Amendment defect inherent in the 1986 conviction has already been afforded to the Commonwealth via its opportunity to defend this conviction against Coss's PCHA petition; the Commonwealth has forfeited further consideration of this "right" by its seven years of inaction. To my mind, the majority's relief gives the courts of the Commonwealth a "free ride" for no apparent reason.

The assumptions underlying the second part of the majority's question — referring to the possibility of a "free ride" for Coss — are equally inaccurate. I reject the implication that a person who has already served a prison

sentence on a conviction that was secured in violation of his Sixth Amendment rights has gotten a "free ride." The majority opinion, in stating that resentencing would provide a windfall to recidivists, seems to believe that a criminal defendant would lie in wait while serving an invalid prison sentence, refusing to contest this initial sentence because of a potential future benefit to him of a later challenge to this sentence in the context of an enhancement proceeding on a hypothetical crime that he has not yet committed.[13] Such an image of what motivates an imprisoned convict strains credulity, and has the additional flaw of having been explicitly rejected by the Supreme Court. In *Garlotte v. Fordice*, 515 U.S. 39, 41 (1995), the Supreme Court held that a prisoner serving consecutive state sentences is "in custody" for habeas purposes on all the consecutive sentences, even those that were scheduled to run first and that had therefore already expired at the time of the petition. The Court rejected the argument that this holding would encourage prisoners to delay raising their claims: "A prisoner naturally prefers release sooner to release later. Further, because the habeas petitioner generally bears the burden of proof, delay is apt to disadvantage the petitioner more than the State." *Id.* at 46. The Court's observations in Garlotte are equally applicable to Coss's case.[14] I therefore find that

13. It is also worth noting that in order to take advantage of this speculative future benefit, our defendant would have to run the "exhaustion" gauntlet of state post-conviction proceedings, and, of course, to prevail on the merits of the *Strickland* test, a heavy burden indeed.

14. It is obvious that Coss himself has made no such strategic decision to delay a challenge to his 1986 conviction. In fact, the (Cont'd)

the majority's specter of a "free ride" is without substance here.[15]

In sum, I can find no support for the majority's choice of relief. I express no opinion on the question whether it would in some other case be possible for us to order such relief. Rather, I would decline to reach that difficult question, and would instead reverse the District Court's denial of Coss's habeas petition and remand to the District Court with instructions that it order a writ of habeas corpus to issue conditioned upon Coss's being resentenced on the 1990 conviction without consideration of the previous 1986 assault conviction. Such relief would comport with the traditional principles of habeas jurisdiction by giving the tribunal that incorrectly subjected Coss to his only current "custody" —

(Cont'd)
District Court's reference to the fact that Coss's PCHA petition challenging the 1986 conviction was pending for "about seven years" before Coss filed the instant § 2254 petition in 1994 makes it clear that Coss challenged the 1986 conviction well before the commission of the offense of which he was convicted in 1990. District Court opinion at 9.

15. One last observation is in order concerning the risk of a "free ride" in this or any other unconstitutional enhancement challenge. Were we to condition our writ on the Commonwealth's resentencing Coss on the 1990 conviction, the sentencing judge would presumably be able to take into account the underlying *facts* at issue in the 1986 conviction, if sufficiently proven, even though our order would bar it from taking the tainted *conviction* itself into account. This ability to consider the facts of a defendant's possible prior bad act reduces the possibility that the defendant can get a "free ride."

namely, the 1990 sentencing court — the opportunity to correct its error by resentencing Coss, ridding his sentence of the unconstitutional taint of his prior conviction.

Judge McKEE joins in this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED JUNE 28, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-7416

EDWARD R. COSS, JR.,

Appellant

v.

LACKAWANNA COUNTY DISTRICT ATTORNEY;
THE ATTORNEY GENERAL OF THE COMMONWEALTH
OF PENNSYLVANIA

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 94-cv-1481)
District Judge: Honorable Thomas I. Vanaskie

Argued March 1, 1999

Before: STAPLETON, RENDELL and ALDISERT,
Circuit Judges

(Filed June 28, 1999)

* * *

Appendix B

OPINION OF THE COURT

RENDELL, *Circuit Judge.*

Edward Coss ("Coss" or "appellant") urges us to reverse the District Court's denial of his motion for habeas corpus relief filed pursuant to 28 U.S.C. § 2254. Coss argues that his counsel's failure to subpoena certain witnesses to testify at his trial constitutes ineffective assistance of counsel and that the District Court erred in failing to so rule. For the reasons stated below, we will reverse the District Court's denial of Coss' ineffective assistance claim and remand to the District Court to issue a conditional writ of habeas corpus.

I. Facts[1]

On June 25, 1986, Coss, aged 17, attended a party at the home of his sister, Carol Ann Frank. Also in attendance were Coss' brothers, Jimmy and Bobby, Coss' girlfriend, Sherry Kulick, Carol Ann's roommate, Lisa Frieto, and Lisa's brother, George Frieto. Most of the guests at the party consumed alcohol. During the course of the party, an argument started between Sherry and Lisa, and thereafter, caused other arguments to erupt among the other guests. These arguments caused Carol Ann to throw everyone out of her house. Arguments continued outside of Carol Ann's house, including one between Jimmy, who was holding a baseball bat, and Coss. As a result of all the noise, Carol Ann's landlord called the police. The police arrived at the

1. Although at his trial Coss' story differed from the facts we recount here, the. District Court clearly credited this version of events, as does Coss implicitly by the very filing of his motion.

scene and tried to quell the fights that had developed on Carol Ann's front lawn. Coss was arrested for disorderly conduct and taken to police headquarters.

That night, Coss was held in the Lackawanna County Detention Facility for underage drinking. Coss damaged the cell in which he was placed and was ultimately charged with institutional vandalism, criminal mischief, criminal trespass, simple assault, theft by unlawful taking or disposition, aggravated assault, resisting arrest, terroristic threats, and disorderly conduct.

Coss met with his assigned attorney, RoseAnn McGowan, two times before his trial. The District Court made the finding of fact that Coss gave McGowan the names and addresses of several potential witnesses during their first meeting.[2] Counsel gave Coss no notice of the trial date but

2. Coss testified at the evidentiary hearing that in the first meeting, he and McGowan discussed "the whole entire story, how it happened, [and] who was involved." Coss' second and final meeting with McGowan prior to his trial occurred after a severance motion, requesting that the charges in connection with the simple assault be severed from those filed for the damage to the juvenile detention center, was filed in September 1986. Coss alleges that he and McGowan also discussed the names of possible witnesses at this meeting. McGowan did not testify regarding her version or what occurred at these meetings. She did testify at the evidentiary hearing that Coss did not give her the names of any witnesses he wanted her to subpoena, but then admitted that she did not specifically remember Coss' case and was instead testifying based on her general practice as a public defender.

The court also noted that, even if Coss did not provide the names to McGowan at this time, a cursory review of the police reports would have identified the names and addresses of some of these witnesses.

contacted him approximately one hour before the trial was to begin, at which point Coss drove directly to the courthouse, stopping only to pick up his brother Jimmy at school.

Coss' trial began on October 30, 1986 and lasted two days. At the trial, the officers who arrested Coss, Officers Adamitis and Wrobel, testified that when they arrived at the scene, individuals began scattering and that they grabbed Coss as he was running to his car. They testified that Coss was screaming vulgarities and smelled of alcohol. They testified that, after being grabbed, Coss began pushing Officer Wrobel and was then arrested. They also testified that as Officer Adamitis attempted to grab Coss' brother Bobby, Coss punched Officer Adamitis in the face. This punch is the basis for Coss' simple assault charge, which is the charge at issue in this appeal. Finally, Officer Wrobel testified that an individual named George also hindered their attempts to arrest Bobby.

The only witnesses to testify on Coss' behalf were Coss and Jimmy.[3] They testified that, on the night in question, they were in their sister's driveway, along with their brother Bobby, and had been there no more than fifteen minutes when two police officers arrived and began to assault Bobby and Coss. Coss stated that there was no party at Carol Ann's house that night, that he had not been drinking, that he did not curse or punch anyone, and that he did not know who the officer was referring to when he stated that an individual

3. McGowan did not suggest that Jimmy testify. Instead, Coss, on his own initiative, brought Jimmy to the trial and asked him to testify. McGowan admitted that she never subpoenaed, interviewed, or prepared Jimmy.

named George was at the scene. Jimmy corroborated this story, stating that there was no party at Carol Ann's, that they were only at Carol Ann's house to give her a camera, that he had not been drinking, and that Coss did not hit a police officer.

The charges ultimately presented to the jury were institutional vandalism and criminal mischief, simple assault, resisting arrest, and disorderly conduct. The jury convicted Coss of institutional vandalism, criminal mischief, and simple assault.[4] Coss was sentenced on January 30, 1987, receiving six months to one year on the simple assault charge and six months to one year on the institutional vandalism charge. The simple assault and institutional vandalism/ criminal mischief sentences ran consecutively. Coss has already served his sentence for these convictions. Presently, he is serving a sentence based on charges from a 1990 conviction, unrelated to his 1986 convictions. Although he has served the term for the assault charge, Coss urges that his claim is not moot because the assault charge was used to enhance the sentence from a 1990 conviction for which he is still being punished.

II. Procedural Posture

On September 15, 1994, Coss filed a pro se petition for writ of habeas corpus pursuant to § 2254. Coss filed an amended petition on November 29, 1995, and a Second Petition for Writ of Habeas Corpus on November 7, 1996.

4. The institutional vandalism and criminal mischief result from Coss' destruction of the detention cell and are not related to Coss' interaction with the police outside of Carol Ann's house.

In the petition, Coss claimed that he was denied his Sixth Amendment right to effective assistance of counsel based on, among other things, counsel's failure to subpoena any of the witnesses he requested.[5]

On April 20, 1998, an evidentiary hearing was held to address Coss' ineffective assistance of counsel claims. At the hearing, each of the witnesses that Coss stated he had identified to counsel, namely, Carol Ann, Bobby, Sherry, and George, testified that McGowan never contacted them regarding Coss' trial and that Coss did not strike any police officer. Bobby, Sherry, and George testified that the first thing that the police did upon arrival was approach Coss and place him in the back of one of the police cars. They testified that the police then chased after Bobby, at which point George jumped on the back of one of the officers to try to hinder his attempt to arrest Bobby. Thus, according to these witnesses' testimony, Coss was in the police car the entire time the police attempted to arrest Bobby. According to the District Court, "McGowan's recollection of the case [at the evidentiary hearing] was somewhat sketchy."[6] She conceded

5. Coss also alleged that his counsel was ineffective for empaneling two jurors adverse to Coss' interests, failing to have the institutional vandalism and criminal mischief charges dismissed, and failing to file post-trial motions. The District Court dismissed these other bases of ineffective counsel and Coss does not appeal their dismissal.

6. From a review of the evidentiary hearing transcript, we agree with the District Court's characterization of McGowan's memory of this case. McGowan was asked the following at the evidentiary hearing:

(Cont'd)

(Cont'd)

> Q. Ms. McGowan, is your testimony, today, based on actual recollection or this particular case, the Coss case, or are you testifying, based upon your general practice, as a Public Defender, when you were employed in the Public Defender's Office?
>
> A. It would — it would be in part, yes, and in part, no. Because certain portions that I've responded to, I have direct recollection. As I said, I have direct recollection — once I looked at the sentencing report, I had direct recollection, exactly, what had transpired. I mean, once Mr. Coss told Judge Cottone, according to the transcript, that he was thinking about an appeal, but they were telling him this, and then I just — I recalled. I do recall distinctly, exactly, that they — the they .. was advising him this way, and he would not listen to me, okay? When we wanted to file the Post-trial Motions on that, he did not want them. . . . That is direct recollection. Now, the other stuff may be general.
>
> . . . .
>
> Q. Ms. McGowan, what I'm asking you about is, do you, specifically, remember having this conversation with Eddie Coss about these witnesses or is your testimony that this is how you normally conduct yourself?
>
> A. No, no. No, no, no, it wouldn't be. I would have asked him what about these people, what about these, what about these? You know, what were they doing there or how are they related to this?

This questioning proceeds, with McGowan answering the questions regarding her failure to subpoena the witnesses in the form of what she "would have" done or what Coss "must have" said, as opposed to telling the court what she "did" or what Coss "said."

during the hearing that she did not investigate the events surrounding Coss' arrest, electing not to dispatch her investigator to interview any of the witnesses at issue, and defended her actions by stating that "Coss must have told her not to subpoena them." Dist. Ct. Op. at 16 (June 10, 1998).

Following the hearing, the District Court denied Coss' ineffective assistance of counsel claims. The court held that, although McGowan's failure to subpoena these witnesses "fell below an objective standard of reasonableness," Coss failed to prove that he was prejudiced by McGowan's failure because the verdict would not have been different given the inconsistency in the accounts told by Coss and his brother on the one hand, and the witnesses and the police on the other. Coss appeals this decision of the District Court, arguing on appeal that the District Court erred in its application of the prejudice prong of the ineffective assistance of counsel test as stated in *Strickland v. Washington*, 466 U.S. 668 (1984).

III. Jurisdiction

Before proceeding to the merits of Coss' ineffective counsel claim, we will first review whether the District Court had subject matter jurisdiction over this habeas petition. Section 2254 confers jurisdiction on United States district courts to entertain petitions for habeas corpus relief only from persons who are "in custody" in violation of the Constitution or laws or treaties of the United States. The Supreme Court has interpreted § 2254 as mandating that the petitioner be "in custody" pursuant to the conviction or sentence he seeks

to attack at the time his petition is filed. *See Carafas v. LaVallee*, 391 U.S. 234 (1968). A habeas petitioner does not remain "in custody" under a conviction "after the sentence imposed for it has fully expired, merely because of the possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes of which he is convicted." *Maleng v. Cook*, 490 U.S. 488, 492 (1989) (per curiam). A petitioner does, however, satisfy the "in custody" requirement for federal habeas jurisdiction when he asserts a challenge to a sentence he is currently serving that has been enhanced by the allegedly invalid prior conviction. *Id.* at 493. Moreover, in *United States v. Tucker*, 404 U.S. 443 (1972), the Supreme Court held that a prisoner could attack in a federal habeas proceeding an allegedly unconstitutional conviction, even if he has served in entirety the sentence resulting from the conviction, if that conviction had an effect on a present sentence. *See also Young v. Vaughn*, 83 F.3d 72, 76 (3d Cir. 1996) (holding that "a prisoner may attack his current sentence by a habeas challenge to the constitutionality of an expired conviction if that conviction was used to enhance his current sentence").

In this case, although Coss has already served the sentence resulting from the allegedly unconstitutional 1986 convictions, he is currently serving a sentence for an unrelated, 1990 conviction in the Court of Common Pleas of Lackawanna County for aggravated assault. Coss alleges that the sentence from his 1990 conviction was adversely affected by the 1986 assault conviction. The sentencing judge did, in fact, refer to Coss' 1986 conviction for assaulting a police officer in sentencing him to the top of the standard range for his 1990 conviction. Coss is thus attacking his prior

conviction in an attempt to have his current sentence, which relied on his prior conviction, reevaluated. The District Court therefore appropriately construed Coss' petition as challenging the 1990 conviction for aggravated assault rather than his expired conviction, *see id.* at 73, and properly concluded that it had jurisdiction over his § 2254 motion petition. *Id.* We have appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 & 2253.

IV. Exhaustion

Absent a valid excuse, a habeas petitioner must present all federal claims to the state courts. 28 U.S.C. § 2254(b); *see also Rose v. Lundy*, 455 U.S. 509 (1982). "The exhaustion requirement ensures that state courts have the first opportunity to review federal constitutional challenges to state convictions and preserves the role of the state courts in protecting federally guaranteed rights." *Evans v. Court of Common Pleas, Delaware County, Pa.*, 959 F.2d 1227, 1230 (3d Cir. 1992) (citing *O'Halloran v. Ryan*, 835 F.2d 506, 509 (3d Cir. 1987)). Of course, "[i]nexcusable or inordinate delay by the state in processing claims for relief they render the state remedy effectively unavailable" and exhaustion will be excused. *Wojtczak v. Fulcomer*, 800 F.2d 353, 354 (3d Cir. 1986).

Prior to filing his § 2254 petition, Coss had a petition challenging his 1986 conviction pending under Pennsylvania's Post Conviction Hearing Act (PCHA), 42 Pa. Cons. Stat. § 9541, *et seq.* (amended 1988), for approximately seven years without any activity. Under these circumstances, the District Court excused the exhaustion

requirement and we can find no fault with that determination. Appellant has not, however, presented to the Pennsylvania state courts his claim that the invalid 1986 conviction was used to enhance his subsequent conviction in 1990, the conviction being challenged by the underlying habeas petition. Nonetheless, we conclude that this is not a situation in which the District Court was faced with a mixed petition necessitating a dismissal under *Rose v. Lundy*. As was made clear by the Pennsylvania Supreme Court in *Commonwealth v. Ahlborn*, 699 A.2d 718 (1997), collateral relief is not available under either the Post Conviction Hearing Act or under the common law remedies of state habeas corpus or coram nobis for a petitioner who is not currently serving a sentence of imprisonment for the conviction he wishes to challenge, even if petitioner contends that collateral consequences stem from that conviction. Accordingly, insofar as state law clearly forecloses state court review of Coss' "collateral consequence" claim, the District Court properly excused exhaustion and entertained the claim on its merit.[7] *See, e.g.*, *Gibson v. Scheidemantel*, 805 F.2d 135, 138 (3d Cir. 1986) (citing *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (per curiam)).

V. Applicable Law

Because Coss submitted filings to the District Court both before and after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), we think

7. We view *Commonwealth v. Ahlborn* not as erecting a "procedural bar," but as a statement that there is no available state remedy for the claim that the present sentence was incorrectly enhanced by an invalid prior conviction.

it necessary to briefly discuss the law governing this action. We conclude that the amendments brought about by AEDPA do not apply to this case as Coss' original petition and amendment were both filed prior to AEDPA's effective date. *See Lindh v. Murphy*, 521 U.S. 320 (1997); *McCandless v. Vaughn*, 172 F.3d 255 (3d Cir. 1999); *United States v. Skandier*, 125 F.3d 178 (3d Cir. 1997). Though Coss did file a "Second Petition" in November 1996, i.e., after the enactment of AEDPA, that petition did not add new claims, but merely waived, as was permitted by the District Court's order of October 23, 1996, those claims presented in his original petition that were determined by the District Court to be unexhausted. *See, e.g.*, *Rose*, 455 U.S. at 510 (a petitioner may amend his petition to delete unexhausted claims); *McMahon v. Fulcomer*, 821 F.2d 934 (3d Cir. 1987) (same).

Amendments to applications for writs of habeas corpus are statutorily provided for by 28 U.S.C. § 2242, which states that such petitions "may be amended or supplemented as provided in the rules of procedure applicable to civil actions." *See* Rule 11 of the Rules Governing Section 2254 Cases; *see also Calderon v. Ashmus*, 523 U.S. 740, __, 118 S. Ct. 1694, 1700 (1998) (Breyer, J., concurring) (amendments to habeas petitions under Rule 11 are governed by Fed. R. Civ. P. 15 unless otherwise expressly governed by the statute). In accordance with Rule 15(a), a party may amend a pleading after a responsive pleading has been served "by leave of court." Fed. R. Civ. P. 15(a). Moreover, pursuant to Rule 15(c)(2) of the Federal Rules of Civil Procedure, if the claim asserted in the amended petition "arose out of the conduct, transaction, or occurrences set forth" in the original petition, the amendment of the pleading relates back to the

date the original petition was filed. As noted previously, the claims in Coss' second amended petition not only "arose out of the conduct" set forth in the original habeas petition and amendment, they were the same claims, minus those that were unexhausted. In fairness, we view his petition filed after AEDPA as tantamount to a further amendment to his initial filing, which he filed at the direction of the District Court, expressing Coss' intention to proceed with his exhausted claims. Therefore, we view all the claims raised as having been asserted in a petition filed prior to AEDPA's enactment date. Accordingly, under pre-AEDPA habeas requirements, Coss was obligated to obtain a certificate of probable cause in order to appeal from the District Court's judgment dismissing his habeas corpus petition.

The pre-AEDPA certificate of probable cause did not require specification of issues and placed the entire case before the court of appeals. *See Ramsey v. Bowersox*, 149 F.3d 749, 759 (8th Cir. 1998); *Herrera v. United States*, 96 F.3d 1010, 1012 (7th Cir. 1996): *see also United States ex rel. Hickey v. Jeffes*, 571 F.2d 762 (3d Cir. 1978). The post-AEDPA certificate of appealability, on the other hand, requires specification as to which issues satisfy the standard set forth in 28 U.S.C. § 2253(c)(2), i.e., those issues for which the applicant has made a substantial showing of the denial of a constitutional right. In the instant case, rather than granting appellant a certificate of probable cause to appeal, the District Court granted Coss a certificate of appealability limited to his claim that counsel rendered constitutionally ineffective assistance by failing to subpoena witnesses on the assault charge. Under pre-AEDPA law we determined that it is inappropriate for a District Court to prescribe the

issues or issue which may be considered in support of or in opposition to a judgment, *Hickey*, 571 F.2d at 766, and appellant is free to choose which claims to assert on appeal. In this case, however, because Coss, through his attorney, limited his request for a certificate of appealability on appeal to the one issue he believed to be of "arguable merit," that is, the ineffectiveness of counsel claim at issue, we see no reason to extend our review beyond the merits of that claim. Moreover, given our disposition of the appeal, we see little difference an expanded review would make.

VI. Discussion

At issue is the District Court's application of the prejudice prong of the *Strickland* ineffective assistance of counsel test. Since Coss' claim involves the legal component of an ineffective assistance of counsel claim, we exercise plenary review. *See Parrish v. Fulcomer*, 150 F.3d 326, 328 (3d Cir. 1998).

In order to obtain relief based on an ineffective assistance of counsel claim, a defendant must not only show that his counsel's performance was objectively unreasonable, but also that it prejudiced his case. *See Strickland v. Washington*, 466 U.S. at 692. The District Court denied Coss habeas relief, despite its finding that counsel's failure to subpoena the witnesses at issue was objectively unreasonable, because Coss had failed to demonstrate prejudice.[8]

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8. We are not asked to review the issue of the reasonableness of counsel's actions as justifiable or strategic decisions. Here, Coss' attorney claimed no tactical merit to her failures except to say that she must have done what Coss wanted in not subpoenaing witnesses; nor does the government contest the District Court's finding that her conduct "fell below objective standards of reasonableness."

To prove prejudice under the second prong of the *Strickland* test, a defendant must "establish a reasonable probability — one sufficient to undermine our confidence in the outcome — that the jury's verdict would have been different if not for counsel's errors." *United States v. Gray*, 878 F.2d 702, 712 (3d Cir. 1989). The District Court reached its conclusion that Coss had failed to demonstrate prejudice based on the fact that the witnesses who testified at the evidentiary hearing painted a completely different picture of the incident leading to Coss' arrest from that told by Coss and Jimmy at trial. The testimony at the evidentiary hearing made clear that, on the night of the incident, Coss had been drinking at a party that had to be broken up by the police. This version of events is a far cry from Coss' trial testimony of a calm, quiet evening sabotaged by two rogue police officers. Assuming that, regardless of counsel's error, Coss still would have testified, and would have testified in the way that he did, the District Court reasoned that the failure to call these witnesses was not prejudicial to Coss, as their testimony, if offered, would only have suggested to the jury that Coss was lying on the witness stand and that Coss was drunk and excitable during the incident. Because this case turned on a credibility determination between Coss and the officers, the District Court reasoned that Coss could not have been prejudiced by counsel's failure to call witnesses who only would have contradicted Coss' version of the facts, destroying his credibility with the jury.[9] The District Court

9. The District Court also considered that Carol Ann and Bobby's testimony would have been suspect since they are Coss' siblings, that Sherry's testimony would have been suspect since she was Coss' girlfriend, and that George Frieto's testimony, while (Cont'd)

thus concluded that the outcome of the trial would have been no different, that is, Coss still would have been found guilty of assaulting the officer, absent counsel's failure.

We disagree with the District Court's reasoning. While it is unlikely that a court can determine with certainty the result of the proceedings absent counsel's error, we must examine the "breadth of the evidence" and examine whether it is sufficient to undermine our confidence that the case would have come out in the way that it did absent counsel's errors. *United States v. Kauffman*, 109 F.3d 186, 191 (3d Cir. 1997). Having examined the breadth of the evidence in this case, including the evidentiary hearing transcript, we conclude that there is a reasonable probability that, had counsel subpoenaed the witnesses at issue, Coss would not have been found guilty of assaulting the officer.

As a result of counsel's failure to conduct an investigation into the events surrounding Coss' arrest on the night of June 25, 1986, only Coss and his younger brother Jimmy testified in Coss' defense. It cannot be doubted that Coss and Jimmy decided to try to conceal what had occurred that evening — that is, the fact that on the night in question they were drinking, underage, at a party — during their testimony. Regardless of Coss' motivation to lie about the context of the incident provoking his arrest, he and Jimmy testified that Coss did not assault a police officer. At the

(Cont'd)
seemingly beneficial to Coss in that he testified that it was he who attacked the officer, is also not inconsistent with the officer's testimony that an individual named George, in addition to Coss, tried to hinder Bobby's arrest.

evidentiary hearing held to investigate Coss' ineffective counsel claims, Carol Ann, Bobby, Sherry, and George all testified that there was a party at Carol Ann's house, that the people at the party were consuming alcohol, that a fight broke out, and that the police came to break up the fight. Most importantly, however, Carol Ann, Bobby, Sherry, and George testified consistently that Coss did not punch a police officer, and Bobby, Sherry, and George testified consistently that George jumped on a police officer's back when the officer assaulted Bobby. Finally, they also testified consistently that, at the time the officers arrested Bobby, which, according to the officers, is the time that Coss punched the officer, Coss was sitting in the police car with the door shut.[10] Thus, although the witnesses' rendition of what happened on the night in question conflicts in large part with Coss' original version of the story, all accounts of the evening are consistent in their most significant respect, the fact that Coss did not commit the assault alleged.

In our view, the District Court employed too narrow an approach in analyzing Coss' claim of prejudice. When it reached the prejudice prong of the *Strickland* test, the District Court stated that " '[p]rejudice' to a defendant from the failure to call witnesses should be assessed *in the context of the other testimony presented by the defense witnesses*." Dist. Ct. Op. at 18 (June 10, 1998) (emphasis added). The District Court then asked whether the result of this trial would have been any different if, instead of only Coss and Jimmy testifying in Coss' defense, Coss, Jimmy, and the other four

10. It is important to note that all witnesses at the evidentiary hearing were sequestered, thus bolstering the credibility of these witnesses' convincingly consistent versions of the critical events.

witnesses had testified in Coss' defense, assuming not only that Coss would still testify, but would tell the tale that he did at trial.

Strickland requires that a court consider "the totality of the evidence before the judge or jury" in determining prejudice. 466 U.S. at 695. It does not require, however, the court to ignore the way in which the "totality" would present itself if counsel's conduct had been objectively reasonable. *Strickland* also recognizes that some errors are so great that a court cannot merely recall the proceedings as they occurred with counsel's error, and then, as the District Court did here, merely add the evidence not presented to determine the alternative outcome of the trial absent counsel's mistake. "Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect." *Id.* at 696-97.

Here, counsel's error had a pervasive effect, altering the entire evidentiary picture at trial. The testimony of the witnesses not presented should not be considered as merely a hypothetical supplement to the evidence offered, with the remainder of the trial presumed to unfold as it actually did. Considering the totality of the evidence, we believe that, had counsel subpoenaed the witnesses and heard from them their version of the events, including the fact that, although the police were partially correct in their allegations, it was George, not Coss, who assaulted the officer, she would not have presented at trial all versions of the evening's events, including Coss' clearly fictional rendition. When we assume the reasonably probable outcome without counsel's

ineffectiveness, we must also assume a scenario that envisions counsel's acting effectively.[11] The District Court should have realized and considered the different course that the trial would probably have taken had counsel acted in an objectively reasonable manner by subpoenaing and interviewing these witnesses, and then presenting a defense consistent with their testimony. If counsel had interviewed these witnesses, we believe that there is a reasonable probability that Coss would not have testified at all, or that Coss would have testified consistently with the other witnesses, thus avoiding the contradictory testimony that troubled the District Court.

We also note that recent Supreme Court jurisprudence has provided additional insight into the "outcome" test, which suggests that, in determining whether a defendant was prejudiced by counsel's ineffectiveness, we should also inquire whether counsel's conduct rendered the verdict "unreliable." Because the outcome test can produce untoward results depending on the facts, the Supreme Court has emphasized that the prejudice inquiry, at its core, involves concepts of reliability and fairness. In *Lockhart v. Fretwell*, 506 U.S. 364 (1993), the Supreme Court was faced with the

11. In fact, as pointed out by appellant, if counsel had put both Coss and the witnesses at issue on the stand and presented an inconsistent theory of defense, that in itself could constitute ineffective assistance. *See Bland v. California Dept. of Corrections*, 20 F.3d 1469, 1479 (9th Cir. 1994). Of course, counsel cannot rely on *Bland* to say that it was proper for her not to offer the witnesses' testimony in her attempt to present a consistent theory of defense, since she did not interview these witnesses to know of any inconsistency.

question of "whether counsel's failure to make an objection in a state criminal sentencing proceeding — an objection that would have been supported by a decision which subsequently was overruled — constitutes 'prejudice' " under *Strickland*. 506 U.S. at 366. The court of appeals, in a divided opinion, had upheld defendant's ineffective counsel claim, even though it had two years earlier overruled the decision that was the basis for defendant's ineffectiveness claim; thus, the omitted objection that was the basis of counsel's alleged ineffectiveness would have been overruled under current law.[12] *Fretwell v. Lockhart*, 946 F.2d 571 (8th Cir. 1991), *rev'd*, 506 U.S. 364 (1993). The majority reasoned that defendant was entitled to the circuit's case law that was in effect at the time of his sentencing because, if counsel had made the objection at issue at that time, the trial court would have had to sustain it and the outcome of the proceeding would have been different. *Id.* at 577. The Supreme Court reversed this decision, stating that the prejudice component of the *Strickland* test focuses not just on whether the outcome of a proceeding would have been different but for counsel's ineffectiveness, but on "whether counsel's deficient performance renders the result of the trial

12. Defendant argued that his counsel should have made an objection based on *Collins v. Lockhart*, 754 F.2d 258 (8th Cir. 1985) (holding that a death sentence is unconstitutional if it is based on an aggravating factor that duplicates an element of the underlying felony). The Eighth Circuit overruled *Collins* in light of the Supreme Court's decision in *Lowenfield v. Phelps*, 484 U.S. 231 (1988) (holding that a death sentence was not invalid on the ground that the sole aggravating circumstance found by the jury was identical to an element of the capital crime of which defendant was convicted). *See Perry v. Lockhart*, 871 F.2d 1384 (8th Cir. 1989) (overruling *Collins* in light of *Lowenfield*).

unreliable or the proceeding fundamentally unfair." *Fretwell*, 506 U.S. at 372. "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Id.* The Court concluded that, despite the fact that defendant was not reaping the benefit of the law in effect at the time of his sentencing, since current case law held that a defendant was not entitled to the particular objection at issue, defendant had not been denied any substantive or procedural right to which the law entitles him and "[t]he result of the sentencing proceeding in the present case was neither unfair nor unreliable." *Id.* at 371. In so honing and clarifying the prejudice test, the court harkened back to similar reasoning in *Nix v. Whiteside*, 475 U.S. 157 (1986).[13]

While in both *Nix v. Whiteside* and *Lockhart v. Fretwell* the application of concepts of reliability and fairness caused the court to conclude that a defendant was *not* prejudiced even though the outcome would have been different absent

13. In *Nix v. Whiteside*, the defendant argued that he received ineffective assistance of counsel because his counsel refused to aid him in presenting perjured testimony. Although it seems likely that such conduct on the part of counsel could have an effect on the trial's outcome, the Court held as a matter of law that "counsel's conduct complained of here cannot establish the prejudice required for relief under the second strand of the *Strickland* inquiry." *Nix*, 475 U.S. at 175. The Court reasoned that, under *Strickland*, the "benchmark" of an ineffective-assistance claim is the fairness and reliability of the adversary proceeding, and that "[w]hether he was persuaded or compelled to desist from perjury, Whiteside has no valid claim that confidence in the result or his trial has been diminished by his desisting from the contemplated perjury." *Id.*

counsel's alleged ineffectiveness, we find the reasoning of these opinions to be helpful nonetheless here, where in the process of examining the probable effect of counsel's error, the District Court did not consider whether the proceeding reached an unreliable, unfair result. *See Fretwell*, 946 F.2d at 579 (dissenting opinion).

Our analysis of this aspect of the second prong of *Strickland* is not unlike our ruling in *Kauffman*, 109 F.3d 186, in which we held that defense counsel was ineffective for failing to investigate an insanity defense for a defendant when counsel had received a letter from a doctor supporting such a defense. Counsel claimed that he did not pursue this defense, and instead encouraged his client to plead guilty, because he viewed the insanity defense as inconsistent with defendant's conduct that demonstrated that he knew and appreciated the criminal nature of his acts. The district court had found no ineffectiveness and no prejudice because it concluded that the outcome would probably have been the same — *Kauffman* would have been found guilty — with or without counsel's alleged ineffectiveness. On appeal, however, we noted that "the breadth of the evidence adduced at the evidentiary hearing is sufficient to undermine our confidence that Zorbaugh would have advised his client to plead guilty rather than proceed to trial and that Kauffman would have accepted that advice." *Id.* at 191. Defendant was prejudiced by counsel's conduct because there was a reasonable probability "that the outcome of these proceedings would have been different had his counsel not failed in this duty to investigate the evidence obtainable from various health professionals." *Id.* In essence, we used our own skepticism regarding the reliability and fairness of the result to inform our determination as to the outcome.

While we do not wish to overstate the applicability of *Nix* and *Fretwell* to the instant situation — since they are clearly distinguishable — nevertheless, they act as a reminder that the concept of reliability and fairness should serve as a guide as we make the prejudice determination. In determining whether there is a reasonable probability that the outcome would have been different absent counsel's ineffectiveness, the district court should look at whether the outcome that did occur was reliable and fair in light of all the evidence before it. In *Kauffman*, that evidence demonstrated that the defendant may well have been totally psychotic and therefore not guilty; similarly, here, that evidence tended to show that Coss was innocent of the assault charge. The results reached in the trial were unreliable and the outcome, had counsel been effective, may well have been different. We think that it is helpful to consider the reliability and fairness of the result reached as an aid to reaching the appropriate conclusion as to the probable outcome had counsel's ineffectiveness not been a factor.

Thus, we believe that counsel's failure to subpoena these witnesses who would have all testified as to Coss' innocence as to the simple assault renders the District Court's view that the outcome of the trial would have been the same with or without these witnesses to be flawed. In light of the amount of exculpatory evidence that was in fact available, yet not presented to the jury, we believe that counsel's conduct made the result of Coss' trial fundamentally unfair and unreliable, and the outcome would have likely been different if the witnesses had been called. Thus, Coss has met his burden under *Strickland*, and subsequent Supreme Court case law clarifying *Strickland*, to prove that he was prejudiced by his counsel's failure to subpoena the witnesses at issue.

VII. Relief

Having determined that Coss' conviction for assault is constitutionally defective, we must determine what habeas relief should be afforded to him. We would normally remand this issue for determination by the District Court, but due to our concern for the defendant's continued confinement based on an unconstitutional conviction — assuming the assault conviction did in fact play a role in enhancing the sentence he now serves — and because the issue is one that has not previously received specific attention in the courts, we will determine the relief we will provide, requiring that the writ be conditioned as we deem appropriate.

We must decide between the two apparent choices for relief: condition the writ on the state's granting Coss a retrial on the 1986 assault charge and, if the result of the retrial differs from the previous result; a subsequent resentencing on Coss' current conviction, removing from Coss' current sentence any enhancement based on the prior unconstitutional conviction; or, condition the writ on the state's resentencing of Coss for his current conviction without any enhancement due to the prior unconstitutional conviction.[14] While a retrial is the usual relief granted in a habeas proceeding based on ineffective assistance of counsel in connection with a current conviction, the Supreme Court precedent has required only resentencing absent consideration of the prior, unconstitutional conviction as the proper relief in this situation. *See Tucker*, 404 U.S. 443. For

14. In his various habeas petitions, Coss has consistently sought a new trial and a new sentencing hearing.

the reasons stated herein, we conclude that the proper relief under these circumstances is the latter of these two options, resentencing absent consideration of the unconstitutional conviction.

The writ of habeas corpus is a civil remedy against unconstitutional confinement. *See Fay v. Noia*, 372 U.S. 391, 423-24 (1963). It is not "a stage of the state criminal proceedings" or "an appeal therefrom." *Id.* at 424. Thus, in an important way, habeas proceedings are independent from the criminal proceedings that have already occurred, serving only to judge and to correct that which results in unconstitutional confinement. In many cases, the issue of unconstitutional confinement is unrelated to the question of guilt or innocence. It may, as in the case at hand, relate to a current sentence that has been enhanced by an expired, yet unconstitutional conviction. A sentence which is enhanced based on a prior unconstitutional conviction, although appearing more attenuated from the actual wrong than a person's incarceration following an unconstitutional trial, is nonetheless unconstitutional confinement and must be corrected. *See Tucker*, 404 U.S. at 449.

We are guided by the Supreme Court decision in *Tucker* in which, as here, the Court granted habeas relief based on a prior conviction that had been served in full, but that had an enhancement effect on the petitioner's current sentence. The Court found the petitioner's current confinement unconstitutional because it was based, in part, on a prior conviction resulting from a trial at which he was denied his constitutional right to counsel. Without any consideration of the petitioner's probable guilt or innocence as to the prior

offense, the Court ordered the writ conditioned upon petitioner's resentencing absent any consideration of the prior, unconstitutional conviction. Since the prior conviction was found unconstitutional, it could have no impact on the petitioner's current sentence. *See id.* at 447-48 (stating that the real question is not whether the outcome of the earlier prosecutions would have been different if Tucker had counsel, "but whether the sentence . . . might have been different if the sentencing judge had known that at least two of [Tucker's] previous convictions had been unconstitutionally obtained").

In *Maleng v. Cook*, the Court was faced with the issue of whether the petitioner was "in custody" in order to confer habeas jurisdiction such that the petitioner could challenge his sentence, enhanced by an allegedly unconstitutional, expired conviction. The Court limited itself to the narrow issue of custody, but expressly recognized the possibility of challenging an expired conviction in connection with an attack on a current sentence enhanced by the prior conviction. In this case, however, unlike *Tucker*, the prior conviction was challenged based on the court's failure to hold a competency hearing.

We have since applied the reasoning in *Tucker* and *Maleng*, holding in *Clark v. Commonwealth*, 892 F.2d 1142 (3d Cir. 1989), that habeas relief was available to a petitioner whose current sentence was based in part on prior convictions tainted by the denial of his constitutional right to due process. Consistent with the relief granted in *Tucker*, we granted the petitioner's writ conditioned on resentencing for the subsequent offense absent consideration of the prior

conviction. *Id.* at 1149 n.10 (stating that the only relief available under *Tucker* is resentencing). In *Young v. Vaughn*, we again applied the reasoning of *Tucker*, holding that the petitioner could challenge his prior conviction, held unconstitutional due to ineffective assistance of counsel, if this conviction was used to enhance his current sentence.[15] Since in *Young* we were addressing only our jurisdiction to hear the habeas petition, we did not specifically consider what relief was appropriate if the petition was successful.

We see no meaningful distinction between *Tucker* and its progeny and the case at hand to cause the relief in this case to be any different from that granted in *Tucker*. Both unconstitutional convictions, although expired, provided grounds for habeas relief because they resulted in the petitioners' serving sentences enhanced thereby, and were, thus, unconstitutional. Just as in *Tucker*, we cannot now

15. Other courts have also recognized this type of collateral consequences relief and have held, consistent with our decisions in *Clark* and *Young*, that complete denial of right to counsel, as in *Tucker*, is not the only constitutional violation justifying such relief. *See, e.g.*, *Brock v. Weston*, 31 F.3d 887 (9th Cir. 1994) (prior conviction challenged based on involuntary and uninformed plea); *Tredway v. Farley*, 35 F.3d 288 (7th Cir. 1994) (prior conviction challenged based on involuntary guilty plea); *Allen v. Collins*, 924 F.2d 88 (5th Cir. 1991) (prior conviction challenged based on ineffective assistance of counsel); *Battle v. Thomas*, 923 F.2d 165 (11th Cir. 1991) (prior conviction challenged based on ineffective assistance of counsel); *Gamble v. Parsons*, 898 F.2d 117 (10th Cir. 1990) (prior conviction challenged based on involuntary and uninformed guilty pleas); *Taylor v. Armontrout*, 877 F.2d 726 (8th Cir. 1989) (prior conviction challenged based on involuntary guilty plea and ineffective assistance of counsel on appeal).

correct by retrial the unconstitutional incarceration resulting from the previous conviction, as that sentence has been served in its entirety. Instead, all that we can do is provide the state court with the opportunity to void Coss' current sentence of the ramifications, if any, resulting from the prior unconstitutional conviction.

Conditioning the writ on resentencing is consistent with the mandate in *Barry v. Brower*, 864 F.2d 294, 301 (3d Cir. 1988). In *Barry*, we warned that "[a] habeas court does not have power to directly intervene in the process of the tribunal which has incorrectly subjected the petitioner to the custody of the respondent official. . . . The respect due the tribunals of a sovereign state within our federal system, however, requires that its courts be given an opportunity to correct their own errors." In this case, we will give the tribunal which incorrectly subjected him to custody — namely, the sentencing court — the opportunity to correct its error by resentencing Coss, ridding his sentence of the unconstitutional taint of his prior conviction.

We realize that the sentencing court must now assess the extent to which the unconstitutional conviction impacted the sentence it handed down and resentence without including the prior offense in its thinking. While this may leave an open issue as to Coss' guilt or innocence of the assault, guilt or innocence is not our charge.[16] *See Herrera v. Collins*, 506

16. It might even be said that our determination here is more probative of Coss' actual guilt or innocence of the assault charge than was the determination in *Tucker*. Here, we determine not only that counsel was ineffective, but, in determining prejudice, we held that there was a reasonable probability that the outcome of Coss' (Cont'd)

U.S. 390, 400 (1993) (stating that "federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution — not to correct errors of fact"); *Tucker*, 404 U.S. at 447-48 ("We need not speculate about whether the outcome of the respondent's . . . prosecutions would necessarily have been different if he had had the help of a lawyer."); S. Rep. No. 80-1526, at 2 (1948) ("Habeas corpus . . . is not a determination of guilt or innocence of the charge upon which petitioner was sentenced. Where a prisoner sustains his right to discharge in habeas corpus, It is usually because some right . . . has been denied which reflects no determination of his guilt or innocence but affects solely the fairness of his earlier criminal trial.").[17] Habeas relief serves to rectify conditions of unconstitutional confinement. Coss is no longer confined for the previous assault conviction. Thus, we are to rid Coss' current confinement of its constitutional defect — which the reliance upon his previous conviction represents. Doing any more than this oversteps the bounds of our task on habeas review.[18]

(Cont'd)
trial would have been different such that Coss may well have been found not guilty. No such finding was required with the invalid conviction in *Tucker*, where we know little as to his actual commission or guilt of the offense, but prohibited its consideration because of its blatant unconstitutionality.

17. In fact, the actual innocence inquiry most often comes into play in habeas proceedings where a petitioner seeking relief on a potentially meritorious constitutional claim faces an otherwise dispositive procedural bar to review or relief. In these cases, the petitioner must proffer a colorable claim of innocence to defeat the bar. *See Herrera v. Collins*, 506 U.S. 390, 404 (1993).

18. We have explained previously that federal courts walk a fine line in fashioning the appropriate relief on habeas review. *See* (Cont'd)

Further, while re-trying Coss' assault would make resentencing fully informed, we think this inappropriate given our limited role in applying habeas relief, as a retrial would have the untoward result of providing Coss with a method of attacking, and altering, the outcome of his assault trial in a way otherwise unavailable to him through direct and collateral review absent this second conviction.[19] It is one thing to enable a petitioner to attack the constitutionality of a prior conviction insofar as it impacts a later sentence; it is quite another to let him reach back and undo that conviction after the opportunity for challenging it on direct appeal and collateral proceedings has come and gone. The concept of

(Cont'd)
Henderson v. Frank, 155 F.3d 159, 168 (3d Cir. 1998) (explaining that the condition upon which the writ is issued must be fitted between two principles: minimizing intervention into the state criminal process and ensuring the cure of all constitutional defects).

19. Actually, Coss did present his ineffective assistance of counsel claim in a collateral challenge to his 1986 conviction filed pursuant to Pennsylvania's Post Conviction Hearing Act. This petition, which served as justification for the District Court to excuse the exhaustion requirement, has yet to be acted upon by the state courts. While Coss' petition remains pending, in all likelihood the state courts would refuse to entertain it at this late date. *See, e.g., Ahlborn*, 699 A.2d at 720 (stating that collateral relief is not available for a petitioner who is not currently serving a sentence or imprisonment for the conviction he wishes to challenge, even if collateral consequences stem from that conviction). Nonetheless, our resolution of Coss' habeas claim, and part of our rationale for declining to find that a new trial would be the appropriate relief here, stems from the fact that doing so would make this type of challenge available even if Coss had not raised this issue in connection with the review of his 1986 conviction.

challenging previous convictions as enhancers is a novel use of habeas; we should not let it bring about untoward results. *See* Alan C. Smith, Note, *More Than a Question of Forum: The Use of Unconstitutional Convictions to Enhance Sentences Following Custis v. United States*, 47 Stan. L. Rev. 1323, 1340 (1995) (stating that "the language in *Maleng* indicates the Court's reluctance to let defendants challenge prior convictions in the federal habeas forum" and that the "reasoning in *Custis* regarding the importance of finality and the difficulty of administering attacks on prior convictions also reveal[s] a desire to severely limit these claims").

Our view that resentencing on the more recent conviction is warranted, rather than a new trial on his 1986 assault charge, is also consistent with language in other case law discussing this unique habeas posture. While *Tucker* appears to be our sole guide as to the conditional relief appropriate in these circumstances, the developing jurisprudence focusing on these unique circumstances is consistent in noting that we are not attacking the expired conviction directly. Instead, the prior conviction may only be attacked in the "context of" the current sentence. *Young*, 83 F.3d at 78 (specifying that a defendant may only attack a prior conviction "in the context of a challenge to the enhanced sentence for which he is in custody"); *Gamble*, 898 F.2d at 118 (interpreting *Maleng* as precluding a defendant from challenging an expired conviction "directly," but stating that a defendant may attack a prior unconstitutional conviction in the context of its effect on a present sentence); *Taylor*, 877 F.2d at 727 (same); *see also Crank v. Duckworth*, 905 F.2d 1090, 1091 (7th Cir. 1990) ("That a person happens to be in custody is of course not a sufficient reason to rummage

through old judgments in search of ones that may be invalid. To obtain relief under § 2254 the prisoner must show that his current confinement violates the Constitution.").[20] It is in the context of his current sentence that Coss has attacked the previous conviction, and it is in that context, and limited to that context, that we will require habeas relief to be afforded to him.

Accordingly, we order that a writ shall issue conditioned upon Coss' being resentenced without consideration of the previous assault conviction.

VIII. Conclusion

For the reasons stated above, we will reverse the District Court's denial of Coss' habeas petition and remand to the District Court with instructions that it order a writ of habeas corpus to issue conditioned upon Coss' being resentenced without consideration of the previous assault conviction.

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20. We do not read *Brock v. Weston*, which did not expressly limit the condition or the writ on the petitioner's resentencing, but rather ordered the district court "to resolve the petitioner's challenge to [the prior] conviction," as inconsistent with our holding here. Instead, we interpret *Brock* as an order to rid the petitioner's current sentence of any ramifications from his prior unconstitutional conviction, not as an order to retry the petitioner on the expired conviction.

Appendix B

ALDISERT, *Circuit Judge*, concurring in part and dissenting in part.

Several important public policy and social welfare considerations divide the panel in this case, the facts of which, at first blush, seem very pedestrian, yet the grant of habeas corpus relief presents an extremely important question that goes to the heart of comity in the relationship of federal courts and state sovereignties in habeas corpus cases brought under 28 U.S.C. § 2254. In granting the writ, the majority denies the Commonwealth of Pennsylvania the option of correcting the constitutional infirmity of incompetency of counsel by means of new trial. I disagree with this result.

I adhere to the long line of cases in this court that typically condition the grant of the writ under § 2254 on allowing the state the option, where it is possible, to cure the constitutional infirmity. My experience in this court's tradition goes back 31 years when I wrote the court's opinion in *United States ex rel. Crosby v. Brierley*, 404 F.2d 790 (3d Cir. 1968), a Pennsylvania murder case in which we determined that the guilty plea was constitutionally infirm.[1]

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1. Therein we stated:

> Accordingly, we will vacate the order of the court below and remand the case with the direction that the district court issue a writ of habeas corpus without prejudice to the right of the Commonwealth of Pennsylvania to undertake appropriate action in the further prosecution of this matter.

404 F.2d at 802.

Appendix B

The precise issue that occupies our attention was not raised by the parties, but rather was injected by the majority without briefing or argument. Indeed, Coss did not even request the relief he is now receiving. In his Second Amended Habeas Corpus Petition, drafted by counsel, Coss simply sought a new trial of his 1986 conviction. *See* Joint App. at 19 ¶4 ("The above stated issues are meritorious and demonstrate that Coss was denied his due process right to a fair sentencing hearing and his Sixth (6th) Amendment right to effective assistance of counsel. Thus, Coss is entitled to a new trial and sentencing hearing with regard to his institutional vandalism, criminal mischief, and simple assault convictions.").

I.

This melancholy chronicle of events started with a simple assault and battery that took place on June 25, 1986, in the small city of Dickson in Lackawanna County, Pennsylvania, when the local police were called to a high school graduation party at the home of Carol Ann Frank, the sister of the then-17 year old Appellant, Edward Coss. It seems that Carol Ann's roommate, one Lisa Frieto, got into a hair pulling contest with another party goer, one Sherry Kulick, and thereafter the revelers, all of whom were juiced up, apparently picked sides and a grand donnybrook was had by all until Carol Ann, the hostess, a real party-pooper, threw everyone out of her house.

Undeterred by the great outdoors, the donnybrookers continued their carousing outside until the landlord and the neighbors called the police. When the cops arrived with their

usual greeting, "Break it up," there apparently was a slight problem in attitude adjustment, and the cops say that Coss threw a couple of punches at one of them, which landed Coss in the local lockup. Totally dissatisfied with the accommodations, Coss proceeded to voice his complaint by destroying a radiator, a sink, a toilet and a light fixture on the ceiling in his cell. For this, he was convicted of simple assault and institutional vandalism and sentenced to six months to a year on each offense. Coss did his time and was released to society on parole.

Seven or eight months after Coss was discharged from Pennsylvania parole supervision on August 30, 1989, a certain Peter Petrovich was beaten "by a group of five or six men, including appellant,"[2] and Coss was arrested and convicted on one count of aggravated assault and battery and one count of simple assault for his part in the group effort to register displeasure on Petrovich's person. Coss was sentenced to a term of six to twelve years imprisonment on the aggravated assault conviction and there is no question that the sentencing judge took into consideration his previous conviction of assault and battery.

II.

The panel is in agreement that a Sixth Amendment deprivation of competent counsel infected the trial for the 1986 offense. We have federal habeas corpus subject matter jurisdiction to reach this conclusion under 28 U.S.C. § 2254, even though Coss is no longer "in custody" for that offense

2. *See Commonwealth v. Coss*, 695 A.2d 831, 833 (Pa. Super. Ct. 1997).

— no longer imprisoned or on parole — because of the teachings of *Maleng v. Cook*, 490 U.S. 488 (1989) (per curiam), *Clark v. Commonwealth*, 892 F.2d 1142 (3d Cir. 1989), and *Young v. Vaughn*, 83 F.3d 72 (3d Cir. 1996).

The majority's approach requires us to assess the rights of society as against the rights of the criminal following a determination that the criminal is in custody for a sentence that has been tainted by a constitutionally infirm conviction, for which the criminal is no longer in custody. The normal relief that we grant in habeas corpus is to order that the habeas petitioner be freed, subject to the right of society to correct in a timely manner the constitutional error through a new state proceeding. It cannot be controverted that had Coss filed his habeas petition during the period he was incarcerated or on parole from the first conviction and we decided that he had been deprived of his Sixth Amendment right to counsel, we would have accorded Pennsylvania the option of releasing him or correcting the infirmity by means of a new trial or other proceedings. *See, e.g., Henderson v. Frank*, 155 F.3d 159 (3d Cir. 1998); *Barry v. Brower*, 864 F.2d 294 (3d Cir. 1988).

Here, however, we cannot "free" Coss because he has already, in the vernacular, "done the crime and done the time." We are thus faced with the very nice question: Should we give society, here, the Commonwealth of Pennsylvania, the right to cure the Sixth Amendment constitutional defect or should we give the Appellant a free ride and have his second sentence declared invalid simply because he is a recidivist?

I think that the state body politic should always have the right to cure the constitutional defect of a conviction used to enhance a sentence on a later conviction (1) if the federal court has the jurisdiction to confer that option upon the state and (2) if it is at all possible by means of new state proceedings. The cases relied upon by the majority to support its grant of extraordinary relief are exceptions to this well-reasoned rule based on the inability of the federal courts to direct new state court proceedings. The circumstances present here fall squarely within our traditional procedures. To follow the course set by the majority, therefore, improperly infringes on state sovereignty and on the notions or federalism, comity and fairness that underlie the habeas corpus framework.

In *Henderson*, *supra*, we explained that "federal habeas power is limited, first, to a determination of whether there has been an improper detention by virtue of the state court judgment; and second, if we find such an illegal detention, to ordering the immediate release of the prisoner, conditioned on the state's opportunity to correct constitutional errors that we conclude occurred in the initial proceedings." 155 F.3d at 168.

It must be asked why, in light of our clear discussion in *Henderson*, the majority seeks to deprive the Commonwealth of the option of correcting the constitutional violation by a new trial on simple assault. The majority's primary answer is a reliance on *United States v. Tucker*, 404 U.S. 443 (1972). Let's examine that case.

A.

The teachings of *Tucker* do not constitute an appropriate analogue to this case or any other federal habeas case brought under § 2254. *United States v. Tucker* by caption and by content was not a habeas corpus case brought under § 2254 based on a *state* conviction; the defendant there was seeking post conviction relief from a *federal* conviction pursuant to 28 U.S.C. § 2255. This is a distinction with a fundamental difference. The Court could not possibly condition relief on affording any state the opportunity to retry the defendant because no state officials were parties to the law suit. No state warden, no custodian, no state officers were respondents or defendants as in the case of a § 2254 petition. In bringing his action, Tucker was attacking a federal sentence imposed by the District Court for the Northern District of California that had been enhanced on the basis of invalid state court convictions from Florida and Louisiana. Because the Court had no state officers as petitioners or respondents before it, the Court lacked power or authority to give the option to a state court in Florida or Louisiana to retry the defendant. To prevent the "erosion of the *Gideon* principle" that the right to effective assistance of counsel is fundamental, the Court had no alternative other than to order that the defendant be resentenced on the federal conviction without reference to the invalid state court convictions.[3] In contrast, in every

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3. The Court's discussion is specifically targeted to a § 2255 case:

> [T]he real question here is not whether the results of the Florida and Louisiana proceedings might have been

(Cont'd)

habeas petition brought under § 2254, an officer of the state or a political subdivision thereof is *always* the respondent.

The teachings of *Tucker* reflect one exception to the general rule of permitting the state to correct the constitutional infirmity in a subsequent sentence enhancement case — where the federal court lacks the authority to afford the state the opportunity to correct the constitutional infirmity because no state officer is a party to the litigation. We now turn to another exception reflected in the cases.

B.

This court has held, and properly so, that where it is *factually impossible* for the constitutional infirmity to be cured by additional state proceedings, the federal court in a § 2254 case may simply order resentencing on the subsequent conviction without considering a previous constitutionally infirm conviction. *See Clark v. Commonwealth*, 892 F.2d 1142 (3d Cir. 1989). *Clark* was a deprivation of due process case lodged against a prior conviction that served to enhance the sentence for a subsequent offense. The gravamen of the petitioner's complaint was that in 1974, when Clark was 17 years of age, he was denied a juvenile court hearing to

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(Cont'd)

> different if the respondent had counsel, but *whether the sentence in the 1953 federal case might have been different* if the sentencing judge had known that at least two of the respondent's previous convictions had been unconstitutionally obtained.

404 U.S. at 448 (emphasis added).

determine whether he should have been tried as a juvenile or as an adult. At the time we heard this appeal in 1989, the petitioner was 31 years old. Accordingly, we could not give the Commonwealth the option of providing Clark a juvenile court hearing. The only relief possible was to order a resentencing on the subsequent conviction without enhancement. Thus, *Clark* reflects at least a second exception to the general rule permitting the state to exercise the option of additional proceedings, to-wit, where it is factually impossible for the state to cure the constitutional defect.

III.

We must then determine what dictates of public policy or social welfare, or what directive force of law — philosophy, history or custom — exists to deny the Commonwealth of Pennsylvania this same option merely because Coss committed another crime and was incarcerated again. To be sure, we have concentrated our federal habeas corpus jurisprudence on the rights of the criminal, but this does not mean that federal judges are at liberty to ignore or totally disregard the rights of society. The great Cardozo taught us:

> The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. "Ethical considerations can no more be excluded from the administration of justice which is the pride and purpose of all civil laws than one can exclude the vital air from his room and live."... [W]hen [judges] are called upon to say how far existing rules are to be

> extended or restricted, they must let the welfare of society fix the path, its direction and its distance.[4]

Drawing the line between individual liberties and rights, and society's rights reflected by government action for the larger good, is still the perpetual question of constitutional law and is the precise issue that faces this panel today. Two thousand years before the Constitution was ratified, the same problem bothered an ancient social order that spoke through Heraclitus: "The major problem of human society is to combine that degree of liberty without which law is tyranny, with that degree of law without which liberty becomes license."[5]

Were we simply deciding a case that involved one young man who had difficulty in the past controlling his urge to punch people and tear out fixtures in a jail cell, and were we to be limited to the facts of this case where, more probably than not, the District Attorney of Lackawanna County likely will not be inclined to commit the resources of his office to retry a simple assault and battery case that occurred thirteen years ago, I do not think that this case would be important at all.

But we must realize that the holding of this case will have a profound effect that far transcends the mundane facts

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4. Benjamin N. Cardozo, *The Nature of the Judicial Process* 66-67 (1921) (footnote omitted).

5. *See* Ruggero J. Aldisert, *The Judicial Process: Text, Materials and Cases* 9 (2d ed. 1996).

before us here and the question of whether we have jurisdiction to consider Coss' appeal in the first place; and that is the whisper of Immanuel Kant behind the ear of every appellate judge reminding us of his famed categorical imperative: "Act as if the maxim of your action were to become through your will a universal law of nature."[6] Two centuries later, an elaboration on the basic theme was uttered: "Judges must decide all the issues in a case on the basis of general principles that have legal relevance; the principles must be ones the judges would be willing to apply to the other situations that they reach; and the opinion justifying the decision should contain a full statement of those principles."[7] This is the concept that undergirds the common law doctrine of precedent: The legal rule announced in a reported case of an appellate court will be applied in subsequent cases presenting the identical facts or materially similar ones.

The majority's holding today is not designed to meet the fugitive exigencies of the hour. Rather, this court is issuing a reward to every recidivist criminal. If you come to federal court during your actual first custody, you will not automatically be set free; the state will be given an opportunity to correct the constitutional infirmity, usually by means of a new trial, some new proceeding or new appeal.

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6. I. Kant, *Groundwork of the Metaphysics of Morals* 89 (Paton trans. 1964) (1785).

7. K. Greenawalt, *The Enduring Significance of Neutral Principles*, 78 Colum. L. Rev. 982, 990 (1978), *commenting on* H. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

But if you wait to file a habeas challenge of the previous conviction until after you commit another criminal act and are sent to jail, the possibilities are so much more palatable, for if you are successful, the body politic does not have the right to correct the original infirmity; automatically, you get the benefit of a resentencing on the second case as if the constitutional infirmity was metaphysically impossible for the state to correct. When you wait until the second offense, Mr. Recidivist Criminal, and the habeas court finds an infirmity in that first conviction, you can thumb your nose to society, "Heads I win, tails you lose." Or in the lingo of the jailhouse lawyers, "Pal, you're gonna get a free pass."

If we are to weigh the various claims, wants and demands asserted on the one hand by the misdemeanant or recidivist and on the other hand by society, the law requires adjustments or compromises of conflicting interests. To do this, we turn to some social interest, frequently under the name of public policy, to determine the limits of reasonable adjustment. We have been taught that a primary social interest is in the general security, long recognized in the maxim that the safety of the people is the highest law. An equally primary social interest is in the life and freedom of the individual. They are on a collision course here, as Heraclitus explained a millennium or two ago, but I feel that if we look at law functionally as an attempt to satisfy, to reconcile, to harmonize, "to adjust these overlapping and often conflicting claims and demands,"[8] the balance must be struck here in favor of the Commonwealth, which should be given the

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8. Roscoe Pound, *A Survey of Social Interests*, 57 Harv. L. Rev. 1, 39 (1943).

opportunity to correct the constitutional infirmity that we have found here.

It is for the foregoing reasons that I dissent in part and would grant the writ of habeas corpus conditioned on the right of the Commonwealth of Pennsylvania to correct the constitutional infirmity by retrying Coss on the 1986 incident.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JULY 30, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-7416

EDWARD R. COSS, JR.,

Appellant

v.

LACKAWANNA COUNTY DISTRICT ATTORNEY;
THE ATTORNEY GENERAL OF THE COMMONWEALTH
OF PENNSYLVANIA
(D.C. Civil No. 94-cv-1481)

Present: BECKER, *Chief Judge*, SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, ALDISERT and STAPLETON, *Circuit Judges*.

ORDER

A majority of the active judges having voted for rehearing *en banc* in the above appeal, it is ORDERED that the Clerk of this Court vacate the opinion filed June 28, 1999 and list the above for rehearing *en banc* at the convenience of the Court.

BY THE COURT:

/s/ Edward R. Becker
CHIEF JUDGE

DATED: July 30, 1999

APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED AND FILED JUNE 8, 1998

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

**1:CV-94-1481
(Judge Vanaskie)**

EDWARD R. COSS, JR.,

Petitioner

v.

LACKAWANNA COUNTY DISTRICT ATTORNEY and THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents

MEMORANDUM

This matter is before the Court on the Second Amended Habeas Corpus Petition of Edward R. Coss, Jr., who alleges violations of his Sixth Amendment right to effective assistance of trial counsel and denial of his Fourteenth Amendment right to due process. In an opinion filed on January 20, 1998, I held that Coss's allegation that he received ineffective assistance of trial counsel in October of 1986 was sufficiently meritorious to require an evidentiary hearing to more completely develop a record. An evidentiary

hearing was held on April 20, 1998. Having completed the evidentiary hearing, this matter is now ripe for disposition.

The evidence presented at the hearing makes clear that the assistance rendered by counsel appointed to represent Coss in his October 1986 trial fell below an objective standard of reasonableness. Particularly, her failure to subpoena or even speak to witnesses who had been at the scene of the incident where Coss was arrested, and her failure to point out that the Commonwealth had not presented evidence on an essential element of the criminal mischief charge, either in her motion for demurrer or via a post-trial motion, compel this conclusion. However, Coss has failed to show that there is a reasonable probability that, but for counsel's error, the result would have been different. As a result, habeas corpus relief will be denied.

I. FINDINGS OF FACT

1. The petitioner in this case is Edward (Eddie) R. Coss, Jr. (Petition for Writ of Habeas Corpus (Dkt. Entry 1).)

2. On June 25, 1986, Eddie Coss, who was then 17 years old, attended a graduation/birthday party at the residence of his sister, Carol Ann Frank, at the rear of 600 Main Street in Dickson City. (Evid. Hr'g Tr. (Dkt. Entry 98) at 19-20.)

3. Eddie Coss drove to his sister's home and was accompanied by his girlfriend, Sherry Kulick, and his brothers, Robert (Bobby) Helring and James (Jimmy) Coss. (*Id.* at 45, 55, 74.)

4. When they arrived at the party several individuals were already there, including Carol Ann Frank, Lisa Frieto (Carol Ann's roommate), and Lisa's brother, George Frieto.

5. During the course of the party, an argument broke out between Lisa Frieto and Sherry Kulick. (*Id.* at 22, 75, 83.) Soon thereafter arguments started erupting between other guests. (*Id.* at 23, 75, 83, 97.) It should be added that most of the guests had consumed alcohol. (*Id.* at 27, 48, 52-53.)

6. As a result, Carol Ann Frank threw everybody out of her home. (*Id.* at 23, 57, 75.)

7. Outside, the arguments continued, including one between Jimmy, who was holding a baseball bat, and Eddie. (*Id.* at 24, 58, 66-67.) George Frieto attempted to break up the dispute between the two brothers. (*Id.*)

8. In the meantime, Carol Ann's landlord was yelling out the window that if everyone did not disperse she would call the police. (*Id.*)

9. Eventually, police officers from the Dickson City Police Department arrived at the scene. (*Id.*) Eddie Coss was arrested for disorderly conduct and taken to police headquarters. (*Id.* at 27, 62, 77.)

10. That night, Eddie Coss was placed in the Lackawanna County Detention Facility at 313

Monroe Avenue, Scranton, Pa. for underage drinking. (*Id.* at 120.)

11. Eddie Coss damaged the cell in which he was staying, destroying a radiator, a sink, a toilet and a light fixture on the ceiling in the cell. (Oct. 1986 Trial Tr. at 113.)

12. Eddie Coss was charged with institutional vandalism, criminal mischief, criminal trespass, simple assault, theft by unlawful taking or disposition, aggravated assault, resisting arrest, terroristic threats, and disorderly conduct. (Mem. & Ct. Order (Dkt. Entry 87) at 3.)

13. On July 29, 1986, Eddie Coss was released on bail. (Evid. Hr'g Tr. (Dkt. Entry 98) at 121.) The conditions of Eddie's bail required him to live with his biological father at 312 New Street, Scranton; not leave Lackawanna County; refrain from consuming alcohol or drugs; refrain from violating any laws; and contact a probation officer every Friday by noon. (*Id.* at 123, 128); (*see also* July 29, 1986 Bail Order.)

14. Eddie Coss was enrolled at West Scranton High School at the time, yet he could not continue to attend that school while living at his biological father's address. (*Id.* at 124.) Instead, Eddie Coss moved into his step-father's residence in West Scranton. (*Id.* at 125, 133-134.)

15. RoseAnn McGowan began working as an assistant public defender for the Lackawanna County Public Defenders Office in July of 1985. (*Id.* at 139.) At the time of Coss's trial, McGowan had fifteen months of experience. (*Id.* at 140.)

16. Robert Helring, Coss's step-father from a previous marriage, met with McGowan to discuss whether Coss should be tried as an adult. (*Id.* at 14-15.)

17. On July 3, 1986, Coss was certified to be prosecuted as an adult.

18. McGowan met with Coss for the first time the first week of August at her office. At that meeting, McGowan was given the names and addresses of several potential witnesses. (*Id.*)

19. The second meeting between Coss and McGowan occurred after a severance motion was filed in September of 1986. This motion requested that the charges against Coss in Dickson City be severed from those filed against him for the damage to the juvenile detention center. (*Id.* at 104, 118.) The motion was denied.

20. After several postponements, Coss's trial began on October 30, 1986. (*Id.* at 13.)

21. Coss never received notice of this trial date. (*Id.* at 105.) McGowan averred that a notice would have been sent to the address where Coss was supposed to be residing as set forth as a condition of bail.

22. Mr. Leo Harding is a part-time investigator with the Lackawanna County Public Defender's office. (*Id.* at 35.)

23. On the night of October 29, 1986, Harding posted a notice regarding Coss's trial date at 312 New Street, the address of Coss's biological father.

24. On October 30, 1986, Harding went to 312 New Street. Harding was notified that Coss was staying at 907 Alders Street, with Robert Helring and Donna Helring, Robert's wife. Harding then went to the Alders street address. (*Id.* at 10.)

25. Neither Robert Helring nor Eddie Coss were home when Harding arrived. (*Id.* at 8.) Harding spoke with Donna Helring and told her that Eddie had to be in court within an hour. (*Id.*)

26. Robert Helring came home and Donna Heiring repeated what Harding had told her. (*Id.*) Robert went looking for Eddie and finally found him at a grocery store. (*Id.* at 106.)

27. Once Eddie was told to go to the courthouse by Robert Helring, he immediately drove there, stopping only at West Scranton High School to pick up his brother, Jimmy Coss, who was sixteen (16) and in the 10th grade. (*Id.* at 16-17, 39.)

28. Based on several motions filed by McGowan, the charges which were ultimately presented to the jury

were institutional vandalism and criminal mischief; simple assault, resisting arrest; and disorderly conduct.

29. The trial lasted two days. (*Id.* at 41, 110.)

30. Two of the officers who testified against Coss, Officers Adamitis and Wrobel, stated that when they arrived individuals began scattering. (*See* Oct. 1986 Trial Tr., Testimony of Officers Anthony Adamitis and Andrew Wrobel.)

31. The officers also stated that Eddie ran to his car and that when Officer Wrobel grabbed him he noticed that Eddie, who was screaming vulgarities, smelled of alcohol. Eddie began pushing Officer Wrobel and Eddie was then arrested. Additionally, as officer Adamitis attempted to grab Eddie's brother, Bobby, Eddie punched him in the face. (*Id.*)

32. Officer Wrobel added that there was another individual named George hindering their abilities to arrest Bobby. (*Id.* at 38.)

33. At the October 1986 trial, Eddie Coss testified that he, Jimmy, and Bobby were in their sister's driveway on the fender of Eddie's car visiting their sister. (*Id.* at 80-82.)

34. Eddie stated he and his brothers were there no more than fifteen minutes when two police officers arrived and began to physically assault Bobby and Eddie.

(*Id.* at 81-83.) Eddie asserted that he did not curse or throw a punch at anyone.

35. Eddie also stated that neither he nor Bobby had been drinking that night. (*Id.* at 85-87.)

36. Eddie also testified that he did not know who the officer was referring to when he stated that there was another individual named George at the scene. (*Id.* at 102.)

37. The only other witness who testified on Eddie's behalf at the 1986 trial was Jimmy Coss.

38. Jimmy Coss stated that he, along with Eddie and Bobby, had gone to his sisters' home to give her a camera, and were sitting in the driveway waiting for their sister to return the camera when the officers came. *Id.* at 116-117.

39. Jimmy testified that he had not been drinking that night and that Eddie never hit an officer in Carol Ann's driveway. *Id.* at 120-121.

40. Neither Donna Helring, Robert Helring, Carol Ann Frank, Bobby Helring, Sherry Kulick or George Frieto testified on behalf of Eddie Coss at his trial.

41. These individuals did all testify at the evidentiary hearing held in April 1998. (Evid. Hr'g Tr. (Dkt. Entry 98).)

42. At the hearing, all the individuals that were present when Coss was arrested testified that he did not strike any police officer. (*Id.* at 28[Carol Ann Frank]; 68[Bobby Helring]; 80[Sherry Kulick]; and 92[George Frieto].)

43. Several individuals at the hearing also testified that it was George Frieto who jumped on an officer's back to prevent Bobby Helring from being assaulted. (*Id.* at 60[Bobby Helring]; 79[Sherry Kulick]; and 90[George Frieto].)

44. McGowan never interviewed any of these individuals or Jimmy Coss.

45. On October 31, 1986, Coss was convicted of institutional vandalism, criminal mischief and simple assault. Coss was not convicted of resisting arrest or disorderly conduct. (Mem. & Ct. Order (Dkt. Entry 87) at 4.)

46. Coss told McGowan that he wanted to file post-trial motions, as well as appeal several issues. (Evid. Hr'g Tr. (Dkt. Entry 98) at 113-115.) McGowan told Coss she would file post-trial motions before she went on vacation. McGowan never filed these motions. (*Id.*)

47. Coss was sentenced on January 30, 1987. He received six (6) months to one (1) year on the simple assault charge and six (6) months to (1) year on the institutional vandalism charge. (Jan. 1987 Sentencing

Proceeding at 9.) For sentencing purposes the criminal mischief charge was merged into the institutional vandalism charge. (*Id.*) The simple assault and institutional vandalism/criminal mischief sentences were to run consecutively. (*Id.*) Coss was also ordered to pay court costs. (*Id.*)

48. On February 3, 1987, McGowan filed a Petition for Reconsideration of Sentence, which was denied.

II. SUBSEQUENT PROCEDURAL HISTORY

1. On September 15, 1994, Coss filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Dkt. Entry 1.)

2. Prior to filing his § 2254 petition, Coss had a petition under the Pennsylvania Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. § 9541, *et seq.*, pending in state court for about seven years without any activity. (Mem. & Ct. Order (Dkt. Entry 87) at 5 n.5.) Under these circumstances, exhaustion of state remedies was excused. *See Hankins v. Fulcomer*, 941 F.2d 246 (3d Cir. 1991) (exhaustion excused based on inordinate delay).

3. An Amended Petition (Dkt. Entry 44) was filed by Coss on November 29, 1995, and a Second Petition for Writ of Habeas Corpus was filed on November 7, 1996. (Dkt. Entry 72.)

4. On April 10, 1997, Magistrate Judge Blewitt submitted a Report and Recommendation suggesting

that Coss's petition be denied for lack of merit. (Dkt. Entry 79.)

5. On May 8, 1997, Coss filed his objections to the Report and Recommendation. (Dkt. Entry 82.)

6. On June 16, 1997, the matter was transferred by Judge Caldwell to the Scranton Division for consideration of the Magistrate Judge's Report and Recommendation. (Dkt. Entry 84.)

7. By Memorandum and Order dated January 20, 1998, Coss's objections to the Report and Recommendation of the Magistrate Judge pertaining to ineffective assistance of counsel were sustained.

8. On April 20, 1998, an evidentiary hearing was held to address the ineffective assistance of counsel claims raised by Coss.

III. CONCLUSIONS OF LAW

A. Jurisdiction

At the outset, a brief explanation is required as to how this Court has jurisdiction to entertain Coss's challenge to his 1986 convictions. Coss has already served his sentence for his 1986 convictions of simple assault and institutional vandalism. Presently, he is serving a sentence based on charges unrelated to the 1986 convictions. However, Coss maintains that his current sentence was adversely affected by the 1986 convictions because the sentencing judge

considered these allegedly unconstitutional convictions in computing Coss's present sentence.

In *United States v. Tucker*, 404 U.S. 443, 447 (1972), the Supreme Court held that a prisoner could attack an allegedly unconstitutional conviction in an attempt to have his current sentence re-evaluated because the judge had relied on a prior unconstitutional conviction in imposing the present sentence. In *Tucker*, three felonies were introduced as evidence in a 1953 trial against Forrest S. Tucker. Tucker was found guilty. During the sentencing proceeding, the district judge gave explicit attention to the three prior felony convictions. Tucker was given 25 years, the maximum term authorized. Years later it was determined that the first two felonies were unconstitutionally obtained. Tucker successfully challenged his sentence. The Supreme Court held that Tucker had to be resentenced:

> [I]f the trial judge in 1953 had been aware of the constitutional infirmity of two of the previous convictions, the factual circumstances of the respondent's background would have appeared in a dramatically different light at the sentencing proceeding. Instead of confronting a defendant who had been legally convicted of three previous felonies, the judge would then have been dealing with a man who, beginning at age 17, had been unconstitutionally imprisoned for more than ten years, including five and one-half years on a chain gang.

Id. at 597.

Relying on *Tucker*, the Third Circuit in *Clark v. Commonwealth of Pa.*, 892 F.2d 1142 (1989), *cert. denied*, *Castille v. Clark*, 496 U.S. 942 (1990) held that it had jurisdiction to review a prisoner's allegedly unconstitutional convictions, the sentences of which had already been completed, in an attempt to determine whether the prisoner's current sentence had to be re-evaluated because the sentencing judge had relied on the prior convictions in imposing the present sentence. Specifically, the court held, "[t]he reviewability of those convictions nonetheless remains before us [ ] because of their collateral enhancement consequences on the 1980 sentence." *Id.* at 1145. In *Clark*, the court remanded the case for resentencing, acknowledging that it was "the only relief permitted under *Tucker*." *Id.* at 1149.

In addition to *Tucker* and *Clark*, more recent support for permitting Coss to challenge his 1986 convictions can be garnered from *Young v. Vaughn*, 83 F.3d 72 (3d Cir.), *cert. denied*, *Abraham v. Young*, 117 S. Ct. 333 (1996). That court stated in no uncertain terms that "a prisoner may attack his current sentence by a habeas challenge to the constitutionality of an expired conviction if that conviction was used to enhance his current sentence." *Id.* at 78.

In this case, Coss's 1986 convictions did not affect his criminal history rating under the Pennsylvania sentencing guidelines for his 1990 aggravated assault conviction. *See Commonwealth v. Coss*, 695 A.2d 831 (Pa. Super. 1997). The sentencing judge, however, did make reference to the 1986 convictions in sentencing Coss to the top of the standard range for his 1990 aggravated assault conviction — 6 to 12

years. Under the applicable precedents, Coss is therefore entitled to challenge the validity of his current sentence by attacking the 1986 convictions.[1]

B. Standard for Ineffective Assistance of Counsel

A "criminal defendant is entitled to reasonably effective assistance of counsel." *Myers v. Gillis*, No 97-CV-1750, 1998 WL 199726, *3 (3d Cir. April 27, 1998). However, before habeas relief may be granted, defendant must show not only that he was provided with ineffective assistance of counsel, but that such deficient performance resulted in prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under *Strickland*, a two-pronged test must be met in order to establish ineffective assistance of counsel: (i) counsel's representation must be shown to have fallen below an objective standard of reasonableness; and (ii) there is a reasonable probability that, but for counsel's error, the result would have been different. *United States v. Kauffman*, 109 F.3d 186, 190 (3d Cir. 1997) (*quoting United States v. Nino*, 878 F.2d 101, 103 (3d Cir. 1989)). A reasonable probability is defined as one which is "sufficient to undermine confidence in the outcome." *Id.* (*quoting Strickland*, 466 U.S. at 694).

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1. As explained in footnote five (5) in my January 20, 1998 opinion, the Pennsylvania courts would not now entertain a challenge to Coss's 1990 sentence based upon the alleged invalidity of his 1986 convictions so there are no available state court remedies to exhaust.

C. Empaneling of Two Jurors Adverse to Coss's Interests

The first issue raised by Coss is that his attorney allowed two individuals adverse to his interests to be selected as jurors. Coss asserts that McGowan began jury selection without him and that she failed to heed his warning that Mr. Kobeski and Mr. Strelecki would be prejudiced against him. McGowan testified that she was absolutely certain that Coss was present when the trial commenced. (*Id.* at 140.) Specifically, McGowan testified that never in her entire career as an assistant public defender had she conducted a trial without the defendant being present and that the court would not have called in a panel without Coss being there. (*Id.*) Furthermore, the testimony of Jimmy Coss cannot be accepted on this issue because he stated that when he and Eddie arrived an individual was already on the witness stand. (Evid. Hr'g Tr. (Dkt. Entry 98) at 40.) If accepted as true, then Eddie would have missed jury selection altogether, and his argument that he told McGowan not to select certain jurors would seem to have been a fabrication. Thus, on this issue, I find the testimony of McGowan to be more credible than that of Eddie Coss or Jimmy Coss. It is likely that Eddie Coss was late to his trial, but based on the testimony of McGowan I find that the proceedings had not yet begun when Eddie Coss arrived at the courthouse.

As a result, I find that Coss was present during jury selection. Furthermore, I do not find to be credible Coss's testimony that he told McGowan not to select Mr. Kobeski and Mr. Strelecki. It simply does not make sense for McGowan not to listen to such advice. Rather, McGowan's

testimony that she and Coss never discussed these two jurors during jury selection seems more truthful. (*Id.* at 140.) McGowan stated that long after the trial had concluded Coss for the first time informed her that two jurors should not have been on the jury. (*Id.* at 141.) McGowan testified, "[m]y impression, at the time, was that Mr. Coss did not know who those jurors were, when we sat there in the courtroom, but was later advised by either his family member or whoever knew them, that they did know them." (*Id.*)

Additionally, even if it is believed that Coss did tell McGowan not to select Mr. Kobeski and Mr. Strelecki and she ignored him, Coss would have only shown that his counsel's representation fell below an objective standard of reasonableness. Coss would still have to show that there is a reasonable probability that, but for counsel's error, the result would have been different. Coss has failed to show prejudice. As previously stated, Coss faced charges of institutional vandalism, criminal mischief, disorderly conduct, simple assault and resisting arrest. The jury acquitted Coss of disorderly conduct and resisting arrest. If Mr. Kobeski and Mr. Strelecki were so bent on nailing Coss, it does not seem likely they would have voted to acquit Coss on any of the charges. The fact that they did acquit Coss of those charges further erodes Coss's argument that these two jurors had a personal vendetta against him.

In sum, since I believe jury selection had not commenced prior to Coss's arrival, since I do not find that Coss objected to the selection of Mr. Kobeski and Mr. Strelecki as jurors, and since I find that Coss has not demonstrated any prejudice based on the these two men having served as jurors, Coss's

claim that McGowan provided ineffective assistance of counsel because she allowed Mr. Kobeski and Mr. Strelecki to serve as jurors during Coss's trial must be denied.

D. Failure to Subpoena Witnesses on the Assault Charges

Coss also argues that trial counsel failed to subpoena any of the witnesses he had requested. Counsel's strategic trial decisions are accorded great deference. *Hess v. Mazurkiewicz*, 135 F.3d 905 (3d Cir. 1998). However, " 'failure to conduct any pretrial investigation generally constitutes a clear instance of ineffectiveness.' While counsel is entitled to substantial deference with respect to strategic judgment, an attorney must investigate a case, when he[/she] has cause to do so, in order to provide minimally competent professional representation." *Kauffman*, 109 F.3d at 190 (*quoting United States v. Gray*, 878 F.2d 702, 711 (3d Cir. 1989)).

During the course of the evidentiary hearing, witness after witness stated that they had not been contacted by anyone regarding Coss's case. Carol Ann Frank, Jimmy Coss, Bobby Helring, Sherry Kulick and George Frieto, all eyewitnesses to the events of June 25, 1986, specifically testified that they had never discussed the case with McGowan or any private investigator working on her behalf. (Evid. Hr'g Tr. (Dkt. Entry 98) at 21[Carol Ann Frank]; 42[Jimmy Coss]; 56[Bobby Helring]; 81[Sherry Kulick]; and 93[George Frieto].) These individuals also stated that Eddie did not attack an officer. (*Id.* at 28[Carol Ann Frank]; 68[Bobby Helring]; 80[Sherry Kulick]; and 92[George

Frieto].) Moreover, several of these individuals, including George Frieto, alleged that it was George Frieto who struck the officer because Bobby Helring was being allegedly beaten. (*Id.* at 60[Bobby Helring]; 79[Sherry Kulick]; and 90[George Frieto].) Coss asserted that he provided the names of these individuals to his attorney when she interviewed him in August of 1986. Even if the names had not been communicated by Coss, a cursory review of the police reports would have identified the names and addresses of some of these witnesses.

Nonetheless, McGowan elected not to subpoena any witnesses, even after the officers testified and stated the names of several witnesses at the scene (i.e. Jimmy Coss, Bobby Helring, Carol Ann Frank (her residence), a George (George Frieto), a pregnant woman at the scene (obviously Sherry Kulick)). In fact, the only witnesses who testified on behalf of Eddie Coss were Eddie and his 16 year-old brother Jimmy, whom Eddie brought to the proceeding on his own initiative. McGowan admitted on cross-examination that she had not met with Jimmy to go over his testimony. (*Id.* at 165-169; *see also* Jimmy Coss's Testimony, *id.* at 42.)

McGowan's recollection of the case was somewhat sketchy. She conceded that she did not conduct an independent investigation, admitting that she elected not to dispatch her investigator to interview these individuals. (*Id.* at 165-172.) McGowan defended her actions of not investigating these witnesses by stating that Coss must have told her not to subpoena them. (*Id.*) Even if Coss had told McGowan not to subpoena any witnesses, her professional judgment as an attorney should have prevailed over that of a

seventeen (17) year-old defendant. In short, McGowan performed *no* investigation and did not exercise any professional judgment insofar as trial strategy was concerned. Her performance thus fell below an objective standard of reasonableness.

Again, however, Coss must also show that he was prejudiced by McGowan's ineffective assistance. He has not met this burden. In *Hess*, *supra*, the court held that in order to meet this element defendant had to "demonstrate a reasonable probability that, but for counsel's errors, the trial's outcome would have been different." 135 F.3d at 909. As earlier stated, a reasonable probability is a probability sufficient to undermine confidence in the outcome.

Coss states he was prejudiced because other witnesses were available that were not subpoenaed. Based on the evidentiary hearing, other witnesses were available that could have corroborated Coss's allegation that he did not hit a police officer. These other witnesses, however, gave testimony that was diametrically opposed to the trial testimony of Coss and his brother Jimmy.

Before pointing out the inconsistencies, it should be noted that the testimony of Carol Ann Frank and Bobby Helring would have been suspect because they were Coss's siblings. Additionally, the testimony of Sherry Kulick would also have been impeachable on the ground that she was Eddie's girlfriend and Eddie was the father of their then recently born daughter. In any event, the evidentiary hearing accounts of what transpired on that night in June of 1986 are so divergent from the trial testimony that they sound like two completely different events.

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The testimony of Jimmy and Eddie at the 1986 trial was that they were not at a party, had not been drinking, and were merely waiting for their sister to give them a camera when two officers, unprovoked, attacked them for no reason. The testimony at the evidentiary hearing makes clear that all three brothers were at a party, and that Sherry Kulick had gone to the party with them. Additionally, the witnesses at the evidentiary hearing consistently testified that all three brothers had been drinking, in complete contrast to the trial testimony of Jimmy and Eddie Coss. All the individuals who testified at the evidentiary hearing also noted that an argument broke out between Sherry Kulick and Lisa Frieto, resulting in Carol Ann evicting all the guests from her house and culminating in an argument between Eddie and Jimmy Coss. The witnesses further testified that many of the guests were arguing, causing a ruckus in the yard and driveway. The commotion was so loud that Carol Ann's landlord threatened to call the police. This scene is quite different from the one portrayed by Eddie and Jimmy Coss at the 1986 trial — a calm and tranquil scene disrupted by two rogue cops.

The testimony of George Frieto, at first glance, seems quite helpful for Coss since he admits to jumping on the back of a police officer. However, George Frieto's testimony is consistent with that of the officers, who unlike Eddie and Jimmy, stated there was an individual named George at the scene of the assault who was attempting to frustrate their arrest of Bobby Coss. Thus, Frieto's testimony is not completely inconsistent with that of the officers. Moreover, Frieto's testimony is inconsistent with the trial testimony of Eddie Coss, who stated he did not know who the officers

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were referring to when they stated there was an individual named George present at the scene. Specifically, in reference to the officer's testimony, Coss stated, "he said there was a third person, George, and I don't even know what he's talking about .... There was me, Jimmy and Bobby, and he [the Officer] came up with the name George." (Oct. 1986 Trial Tr. at 102.)

"Prejudice" to a defendant from the failure to call witnesses should be assessed in the context of the other testimony presented by the defense witnesses. Otherwise, a defendant whose story was not believed by the jury could fault defense counsel for not presenting a different version of events. Essentially, Eddie Coss wants to change the story presented to the jury by him and Jimmy. Coss wants to blame his counsel for not calling witnesses who would have contradicted his testimony in many significant respects.[2] Having given one sworn version of the events in question, a habeas petitioner should not be permitted to contest the reliability of the verdict on the basis of an inconsistent account by other witnesses. When considered in the context of Eddie and Jimmy's trial account, the testimony presented by the evidentiary hearing witnesses does not undermine confidence in the jury's verdict. The jury was called upon to make a credibility determination — whether to believe the

2. The story told the jury by Eddie and Jimmy Coss lends credence to Atty. McGowan's testimony that Eddie Coss did not want her to call other witnesses to testify. Their testimony would have implicated them in an illegal underage drinking party, as well as implicated George Frieto in the assault of a police officer. It is likely that Eddie Coss did not want to place his family members and friends in such jeopardy.

Coss brothers or the police officers. Had information that all three brothers were drinking and that Jimmy and Eddie Coss had come close to blows been introduced at the trial, it would have completely contradicted Eddie Coss's version of the facts. Additionally, the fact that these young brothers had been drinking a large amount of alcohol and were obviously in an agitated state would have provided another basis for disbelieving the Coss brothers. Under these circumstances, the evidence presented in this matter does not establish a reasonable probability that the outcome of the case would have been different if Coss's family members and the Frietos had testified.

In short, the testimony presented at the evidentiary hearing will not be allowed to undermine confidence in the jury's determination that Coss was guilty of simple assault. Since Coss has failed to show prejudice, this claim must be denied.

E. Failure to Have the Institutional Vandalism and Criminal Mischief Charges Dismissed.

Next, Coss argues that McGowan provided ineffective assistance of counsel when she failed to raise the issue that the Commonwealth had not met all the elements necessary to convict Coss of institutional vandalism and criminal mischief. According to the criminal complaint, the District Attorney of Lackawanna County charged Coss under 18 Pa.C.S. §§ 3307(a)(3) (Institutional Vandalism) and 3304(2) (Criminal Mischief). Specifically, Coss was charged with committing the offense of institutional vandalism by knowingly damaging a juvenile detention center and with

committing the offense of criminal mischief by intentionally or recklessly tampering with tangible property of another so as to endanger person or property. The complaint also stated that, as to both charges, Coss had caused pecuniary losses in excess of $1,000.

At Coss's trial, the Assistant District Attorney had four witnesses testify that Coss had destroyed his cell at the juvenile detention center: Officers Anthony Adamitis and Andrew T. Wrobel; Chief Probation Officer and Superintendent of the Lackawanna Detention Center, Anthony P. Gach; and Child Care Worker, Father Nestor Kowal. These individuals testified that Coss destroyed a radiator, sink, toilet and light fixture. (Oct. 1986 Trial Tr. at 113.) None of these four witnesses, however, provided any evidence as to the dollar value of the damage done to the juvenile detention center.

Coss correctly argues that since he was charged with a second degree misdemeanor on the criminal mischief charge, (the criminal Information indicated Coss was charged with an "M-2" and that he had caused damage in excess of $1,000), it was incumbent upon the Commonwealth to prove economic loss of more than $1,000 beyond a reasonable doubt. Coss stated that no evidence was presented establishing an economic value on the damaged property. As a result, the district attorney did not meet all of the elements necessary to convict Coss of second degree misdemeanor criminal mischief. McGowan's failure to raise this point indicates that her representation fell below an objective standard of reasonableness.

However, Coss incorrectly argues that the same analysis applies to the institutional vandalism charge. Section 3307(b) provides that institutional vandalism is a misdemeanor of the second degree when the damages are $5,000 *or less*. In terms of this charge, Coss was charged with a misdemeanor of the second degree, as a result it was not necessary to establish an economic value for the damaged property. The government would only have had to establish a pecuniary loss if the offense had been graded as felony of the third degree. In that case, the Commonwealth would have had to show a pecuniary loss in excess of $5,000. (*Id.*)

More importantly, when Coss was sentence he did not receive a sentence on the criminal mischief charge. The sentencing judge noted that the criminal mischief sentence was merged into the institutional vandalism sentence. The sentencing transcript makes clear that "no additional sentence [was] imposed on [the] criminal mischief [charge]." (Jan. 1987 Sentencing Proceeding at 9.) The uncontradicted evidence showed that Coss committed institutional vandalism. Without proof of damages exceeding $5,000, this crime is a misdemeanor of the second degree, and Coss was sentenced within the range of a second degree misdemeanor.[3] As a result, Coss is not entitled to prevail on his claim that McGowan rendered ineffective assistance when she failed to raise the issue that the prosecution had not met an element of the criminal mischief charge.

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3. A second degree misdemeanor is subject to imprisonment of not more than two years. 18 Pa.C.S. § 106(b)(7).

F. Failure to File Post-Trial Motions

Finally, Coss has asserted that McGowan provided ineffective assistance of counsel because she did not file post-trial motions on his behalf. Coss stated that he specifically asked McGowan to file post-trial motions with the trial court. Coss further alleged that McGowan said she would file these motions before she went on vacation to Lake Ariel. McGowan responded to this claim by stating that she did not file post-trial motions because Coss told her not to. McGowan alleged that Coss wanted to be sentenced as early as possible to avoid sitting in jail. Coss, however, was free on bail pending sentencing. When McGowan was informed that Coss was not in jail, but out on bail during that time-period, (*see* Oct. 1986 Trial Tr. at 148), she could not provide a reason for why Coss would want to forego the filing of post-trial motions, except that perhaps someone told him he was better off not filing such motions.

Coss, however, has not demonstrated that there is a reasonable probability that, but for counsel's error, the result would have been different. As previously stated, McGowan's failure to raise the issue that the prosecution had not established an element of the criminal mischief claim did not prejudice Coss. Thus, McGowan's failure to raise this issue on a post-trial motion did not prejudice Coss. The only other issue which Coss noted might have been appropriately raised in a post-trial motion was the inconsistency of being found guilty of simple assault and not guilty of resisting arrest. Since there is nothing inherently inconsistent in these verdicts, this post-trial motion would have been meritless. As Judge Cottone stated at the January 1987 sentencing

hearing, "it's not inconsistent that you be convicted on simple assault and still you didn't have to be guilty of resisting arrest." (Jan. 1987 Sentencing Proceeding at 5.) In fact, the record suggests that, if the testimony of the officers were accepted, Coss could be guilty of simple assault and not resisting arrest since Coss punched the officer after he had been arrested. Thus, the testimony indicates that Coss did not punch the officer to avoid being arrested, but in order to protect his brother Bobby. As a result, McGowan's failure to file post-trial motions on behalf of Coss did not constitute ineffective assistance of counsel.

III. CONCLUSION

For all the foregoing reasons, Coss's Second Petition for Writ of Habeas Corpus be denied. An appropriate order is attached.

s/ Thomas I. Vanaskie
Thomas I. Vanaskie
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

1:CV-94-1481
(Judge Vanaskie)

EDWARD R. COSS, JR.,

Petitioner

v.

LACKAWANNA COUNTY DISTRICT ATTORNEY and THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents

ORDER

June 8, 1998

NOW, therefore, in accordance with the attached Memorandum, it is hereby **ORDERED THAT**:

1. Coss's Second Petition for Writ of Habeas Corpus (Dkt. Entry 72) is **DENIED**.

2. The Clerk of Court is directed to mark this case **CLOSED**.

s/ Thomas I. Vanaskie
Thomas I. Vanaskie
United States District Judge